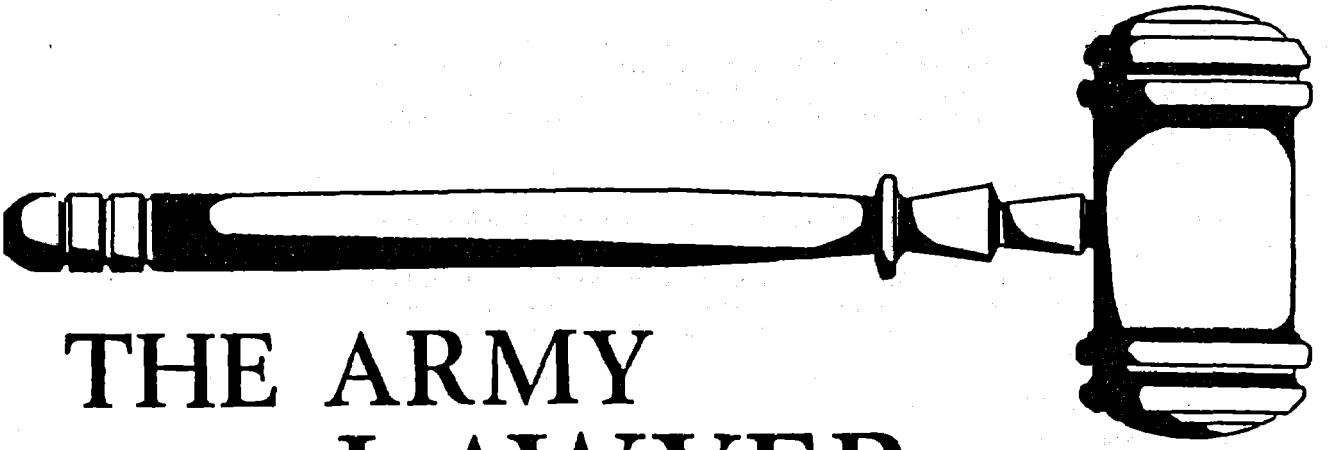

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Further Adventures in Commercial Sponsorship*

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In February 1988, the Assistant Secretary of Defense for Force Management and Personnel authorized the various services to run a one-year test program on commercial sponsorship for a variety of activities.[1] Although practitioners identified several shortcomings with the program during its testing period,[2] the Department of Defense (DOD) later decided to extend the commercial sponsorship program indefinitely.[3] This article identifies areas of specific concern within the program and proposes a model analysis to resolve these problems. The discussion reflects the author's experiences with the United States Army, Europe (USAREUR) and Seventh Army; however, it readily may be applied to sponsorship activities Army-wide. A judge advocate's goal should remain the same wherever the program is administered—that is, to maximize the benefits of commercial sponsorship without straying beyond the bounds of regulatory propriety.

Event or Program?

The commercial sponsorship program authorizes sponsorship only for events; it does not authorize sponsorship for programs.[4] Although this concept may appear quite straightforward, applying the rule to a specific situation is not always a simple process. Several recent sponsorship proposals illustrate this difficulty. If closely analyzed, however, they also may provide administrative law attorneys with a rough rule of thumb for determining when sponsorship is appropriate.

In one case, USAREUR wanted to reward soldiers and family members who had participated in, or had supported, Operations Desert Shield and Desert Storm. USAREUR planners suggested temporarily converting the Armed Forces Recreation Center in Berchtesgaden into a resort to provide USAREUR personnel and their families with a three-day, two-night vacation at no charge.[5] Headquarters, USAREUR, approved the use of the center as an morale, welfare, and recreation (MWR) activity. The question then arose whether the recreation center could solicit commercial sponsorship to defray the costs of the vacations.

In another case, an MWR activity wanted to run a bowling promotion for an entire summer. If a patron bowled nine games at the recreation center, the activity would provide him or her with a tenth game at no charge and also would enter the patron's name in a drawing for prizes to be contributed by sponsors.

Both proposals contemplated commercially sponsored activities that would run for extended periods. In each case, the duration of the proposed activity raised the issue of whether the activity was an "event" or a program. Significantly, Army commercial sponsorship guidelines endorse events that can run as long as one month,[6] but they do not discuss events of greater duration.

Judge advocates may apply either of two tests to resolve this question. In the first test, one might characterize an activity as an event if it occurs only once—even if it will continue for a protracted period. Examining the Berchtesgaden proposal, the planners noted that the center has a limited capacity. Only a few hundred patrons can be served at one time. The pool of eligible patrons, however, exceeded half a million people. Moreover, USAREUR soldiers who had deployed to the Gulf were returning over a protracted period of time. Thus, to extend the vacation opportunity to most or all of its soldiers and to fulfill the purpose of the activity, USAREUR clearly had to extend use of the recreation function for as

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*The solicited commercial sponsorship program is an innovative, rapidly developing program. New regulations, changes to existing regulations, and new guidelines may be published affecting the program. Judge advocates must ensure that they have the most current guidance when evaluating any solicited commercial sponsorship proposal.

[1] Memorandum, Assistant Secretary of Defense, Force Management and Personnel, 29 Feb. 1988, subject: Commercial Sponsorship of Morale, Welfare and Recreation (MWR) Events [hereinafter ASD Memorandum].

[2] Joseph P. Zocchi, *Commercial Sponsorship: Salvation for Army Morale, Welfare and Recreation Programs or Shortsighted Folly?*, The Army Lawyer, Sept. 1990, at 9.

[3] Memorandum, Assistant Secretary of Defense, Force Management and Personnel, 8 Jan. 1990, subject: Commercial Sponsorship of Morale, Welfare, and Recreational (MWR) Events.

[4] *See* Zocchi, *supra* note 2, at 11.

[5] As finally implemented, the center provided patrons with breakfast, dinner, and room free of charge. Lunches, tours, and other personal expenses were paid for by the patrons.

[6] Memorandum, Director, Program Analysis and Evaluation Directorate, U.S. Army Community and Family Support Center, 30 Jan. 1989, subject: Solicited Commercial Sponsorship of Army MWR Events, [hereinafter CFSC Memorandum]; *see also id.*, enclosure 2, Potential Community Events Under Solicited Commercial Sponsorship [hereinafter CFSC Suggested Events].

long as possible.[7] The proposal, however, provided that each participant would visit the center only once. It would not be a continuous recreational opportunity. As commonly defined, an event is a single noteworthy occurrence, while a program, by implication, is ongoing in nature.[8] Despite the vacation center's projected year-long operation, visits by the proposed patrons would not recur. Focusing on the patronage of the center, the planners determined that the vacation activity was an event and not a program.

To focus on patronage in the summer bowling promotion, however, would yield a different result. Bowling center patrons normally return regularly. Moreover, the purpose of the promotion itself not only was to draw in new patrons, but also was to encourage current patrons to return again and again. Nevertheless, USAREUR properly determined that the summer bowling promotion was an event rather than a program. Although the promotion would last longer than the events described in the Army guidelines,[9] it nevertheless had a rational, discrete, duration (one summer)—much like the "Month of the Military Child" or other events for which the guidelines expressly permit commercial sponsorship. The promoters had identified the summer as a prime time to engage young people in recreational activities and they evidently did not intend to advance the promotion beyond that period or that purpose.

Certainly, any event of sufficient duration may begin to look like a program, but even activities that run longer than a month legitimately can be characterized as events. The critical question is whether an activity will continue indefinitely, or whether it will run instead for a discrete period that comports with its MWR purpose. An administrative law attorney should review each proposed activity on its own merits. An activity that at first blush looks like a program actually might more properly be classified as an event.

Alcohol and Tobacco Sponsorship

Commercial sponsorship guidelines forbid MWR activities to solicit sponsorship from manufacturers or distributors of alcohol or tobacco.[10] If, however, a manufacturer or distributor of these products offers to sponsor an MWR event that is similar to activities that the corporation commonly sponsors in the civilian sector, the MWR activity may accept this offer.[11] The difficulty lies in conforming this guidance to other regulatory provisions.

Army Regulation 600-85 prohibits publicity that glamorizes or encourages alcohol abuse.[12] An MWR-sponsored event may not violate that prohibition, even though it may recognize that the use of alcohol is both legal and socially acceptable. If an event focuses not on the consumption of alcohol, but on some legitimate morale or recreational purpose, the MWR activity may accept sponsorship of a manufacturer or distributor of alcohol. The Judge Advocate General adopted this approach in an opinion approving an offer by Anheuser Busch to distribute free beer to race participants at the 1990 Army Ten-Miler Run.[13] The Judge Advocate General, noting that the focus of the event was the run itself, concluded that the proposed use of the alcohol did not glamorize or encourage alcohol abuse.

Another issue may arise, however, when an alcohol or tobacco corporation offers to sponsor an MWR event. The Department of Defense policy permits an MWR activity to accept support from alcohol and tobacco manufacturers and distributors, but bars the activity from advertising cooperation between the military and the corporation in any way that directly or indirectly identifies an alcohol or tobacco product with the event.[14] Accordingly, materials promoting an event may identify an alcohol or tobacco manufacturer but may not advertise the cooperation between the Army and the sponsor. A sponsor, however, understandably wants people to associate its product with the event it is supporting. How, then, can the activity satisfy the sponsor without violating DOD policy?

Although these provisions may appear incompatible, one approach may reconcile them. Morale, welfare, and recreation activities may permit sponsors to display posters or banners or to distribute promotional literature on site. Participants in the event already are in attendance and the promotional materials serve only to identify the sponsor to these participants. The display or distribution of promotional materials thus does not constitute an

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[7] As ultimately approved in April 1990, the dedicated recreation center operation was scheduled to end no later than April 1991. *See* Memorandum, Commander, U.S. Army Community and Family Support Center, 28 Mar. 1991, subject: Transfer of Armed Forces Recreation Center (AFRC)-Berchtesgaden to Headquarters, U.S. Army, Europe; Message, HQ, Dep't of Army, DAPE-ZA, 221953Z Mar 91, subject: Special Pass Operation at Berchtesgaden.

[8] *Compare* Webster's Third New International Dictionary 788 (1961) (unabridged) (defining event) [hereinafter Webster's Dictionary] *with id.* at 1812 (defining program).

[9] *See generally* CFSC Suggested Events, *supra* note 6.

[10] *Id.*; *see also id.*, enclosure 1, Army Statement of Guidelines, Principles and Procedures for Solicited Commercial Sponsorship, para. *h* [hereinafter Army Statement of Guidelines].

[11] *See* CFSC Memorandum, *supra* note 6; Army Statement of Guidelines, *supra* note 10, para. *h*.

[12] Army Reg. 600-85, Alcohol and Drug Abuse Prevention and Control Program, para. 1-10*a* (21 Oct. 1988).

[13] DAJA-AL 1990/2552, 26 Sept. 1990.

[14] Department of Defense Dir. 1010.10, Health Promotion (Mar. 11, 1986).

advertisement—which, by definition, is a presentation intended to induce the public to buy or support an item.[15] Materials to be distributed or displayed *off site*, however, are targeted at people who have not yet committed, and may not ever commit, to participation in the event. To display the sponsor's logo or other identification in these materials would not only identify the sponsor, but also could constitute prohibited advertised cooperation.

Advertising Issues

This article already has discussed one advertising issue—that of alcohol and tobacco corporations. This is not the only advertising issue, however, that can affect sponsorship. One of the administrative lawyer's biggest dilemmas is reconciling commercial sponsorship with regulations restricting on-post advertising. Army Regulation 210-7 strictly controls on-post advertising and commercial solicitation.[16] For example, on post, a sales person may distribute promotional literature only to an individual being interviewed.[17] Local regulations may be even further restrictive.[18]

Administrative law attorneys and MWR activities carefully must ensure that "sponsors" do not use the commercial sponsorship program to evade commercial solicitation restrictions. To date, at least one insurance company has attempted to manipulate the system in this manner.[19] This company proposed to run weekly drawings for gift certificates. The entry blanks for this drawing, however, not only contained the insurance company's logo and identification, but also solicited input from each contestant on insurance and investment areas about which he or she might want to obtain more information. Even if one accepts the dubious proposition that an MWR activity manager should develop an "event" solely to accommodate a corporate proposal, one still must ask whether the insurance company actually had proposed any kind of MWR event at all.[20] An MWR event must serve some morale, recreational, or community purpose. The insurer's proposal would have advanced none of these purposes. In effect, the insurance company merely offered the installation the "opportunity" to grant it access to soldiers on post—even though the insurance company actually did not meet regulatory requirements to solicit on an installation—in exchange for weekly donations of twenty-five dollar gift certificates.

A long-term event may generate yet another advertising problem—that of keeping sponsor identification within the restrictions of regulations that govern on-post advertising. The commercial sponsorship program permits an activity to identify a sponsor in conjunction with an event[21]—it does not open the door to at-will advertising on military installations. What happens, however, if an activity plans a long-term event that will take place entirely on military property? USAREUR had to resolve this problem during the Berchtesgaden project when a corporate sponsor donated funds for the purchase of television sets for the center. The activity considered placing a plaque identifying the company as the donor on each television and permitting the company to display corporate literature next to the sets. The plaques offered no difficulties.[22] Moreover, a brief display of corporate literature at an appropriate time—perhaps even throughout the Month of the Volunteer—probably would not have been objectionable. The Berchtesgaden vacation activity, however, was scheduled to run much longer than a single month. Theoretically, the rule should not change. If sponsor identification in conjunction with an event is legitimate and an event continues for an extended period, the display of sponsor materials should be permitted for an identical period. To follow that theorem relentlessly, however, leads to an uncomfortable position, particularly in light of DOD restrictions on on-post advertising. In this situation, the MWR activity took the middle road—it

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[15] *See, e.g.*, Webster's Dictionary, *supra* note 8, at 31.

[16] *See generally* Army Reg. 210-7, Commercial Solicitation on Army Installations (15 Dec. 1978) [hereinafter AR 210-7].

[17] *Id.*, para. 2-7*f*(14).

[18] For example, United States Army Europe Regulation 210-70 prohibits all on-post display of commercial advertisements, except advertisements for the Army and Air Force Exchange Service (AAFES). *See* U.S. Army Europe Reg. 210-70, Personal Commercial Affairs, para. 9*k* (24 May 1988) [hereinafter USAREUR Reg. 210-70]. Advertisements may be placed in unofficial military publications or distributed through the host nation mail system. *Id.*, paras. 12*a*, 12*d*.

[19] Insurance solicitors in particular are closely regulated. *See* AR 210-7, ch. 3; USAREUR Reg. 210-70, sec. IV. Accordingly, insurance companies who want to sell to United States military personnel doubtlessly feel challenged by the limitations on access to an available pool of purchasers that are conveniently located on installations and in housing areas.

[20] Interestingly, the installation sought no legal advice until the company attempted to recover "entry" forms from everyone that had filled in the form and not just from those who had marked on the "entry" that they wished further insurance information. Incidently, the entry forms—presumably provided by the insurance company, and which contained no disclaimers, identifications of MWR events, or Privacy Act notices concerning the personal information they sought to collect—violated virtually every regulatory restriction on on-post solicitation.

[21] *See generally* Army Statement of Guidelines, *supra* note 10.

[22] This acknowledgment of a donor on donated property comports with general rules on gifts to the MWR. *See* Army Reg. 215-1, The Administration of Army Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities, para. 3-13*w*(3) (10 Sept. 1990) [hereinafter AR 215-1].

displayed the plaques on the televisions throughout the event, but permitted the corporation to display its literature only for a limited period.[23]

Another problem may derive from the nature of the advertising itself. One MWR fund manager considered placing an advertisement in the *Stars & Stripes* to thank a sponsor for its participation in an event. Army regulations permit MWR activities to use nonappropriated funds (NAFs) to purchase advertising targeted for authorized MWR program patrons.[24] In the instant case, however, the event ended more than a month before the advertisement would have appeared. The advertisement, therefore, would not have promoted an MWR service and, in essence, would have targeted not authorized patrons, but potential corporate sponsors. Moreover, Army guidelines require an activity to conduct sponsorship pursuant to an agreement, the complexity of which is determined by the nature of the event.[25] In this case the parties had not included advertisement as a term of the agreement. Accordingly, to place an advertisement thanking the sponsor, the MWR manager would have had to draw on a nonappropriated fund to pay for a service that was not required expressly by the contract—a prohibited dissipation of NAF assets.[26] Finally, the manager could not have agreed to a requirement for such a thank you advertisement in any case. The commercial sponsorship program permits an MWR activity to acknowledge a sponsor's contribution in an advertisement, but it states that the use of the sponsor's name, logo, or other identifier must be merely incidental to publicizing the event.[27] An MWR activity may advertise a sponsored event, but it may not advertise the event's sponsor.

Contract Issues

Morale, welfare, and recreation activities face many perils in the contracting area when arranging for sponsorships.[28] The most sensitive is the potential for an almost incestuous relationship to develop between an industry and an activity's contracting officer. The sample agreement that appears in the Army guidelines implies that all sponsorship agreements should be signed by a contracting officer.[29] A contracting officer, however, would be ill-advised to follow this guidance. The standards of conduct implications of involving a contracting officer in the sponsorship process are dire, particularly when the potential sponsor is a defense contractor.

The principal response to solicitation for sponsorship normally comes from defense contractors. Absent waves of patriotic fervor, like the enthusiasm that swept the country during Operations Desert Shield and Desert Storm, the companies that care most about the military are the companies that do business with the military. The potential for conflict of interest is obvious. Unfortunately, at present many contracting officers not only are signing agreements, but also are preparing solicitations and otherwise seeking sponsors. This practice must end. Unless literally no alternative exists to involving contracting personnel in sponsorship solicitations, they should keep out of the sponsorship program and should turn it over to marketing and advertising specialists or to other MWR personnel.

Here, however, one warning note must be sounded. At times, contracting personnel *must* review sponsorship proposals to ensure that the benefits the Army proposes to offer a corporate sponsor do not violate the terms of existing contracts. In one case, several corporations competed for an Army-Air Force Exchange Service (AAFES) contract in Europe. The federal government bestowed upon the winning bidder certain exclusive rights of operation on a military installation. One losing bidder later offered to become a commercial sponsor. It asked to display and distribute promotional literature on the installation as part of routine sponsor identification. Had the installation permitted the sponsor to distribute this information, however, this would have violated the AAFES contractor's exclusive rights. Fortunately, a sharp-eyed marketing specialist noticed this and prevented a potential breach-of-contract claim.

Standards of Conduct

Ethical issues present a dominant theme in the commercial sponsorship program. For example, the problems that arise from soliciting commercial sponsorship from defense contractors are virtually inescapable. Administrative law practitioners, however, can deal with these problems in many ways. For instance, an attorney may advise an MWR activity to invite sponsorships by publishing a notice in the *Commerce Business Daily*.[30] Morale, wel-

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[23] The literature, incidentally, did not contain finance application forms or similar materials. The purpose of the leaflets was identification, not sales.

[24] AR 215-1, paras. 3-14*c*, 10-15.

[25] *See* Army Statement of Guidelines, *supra* note 10, para. 3*c*; CFSC Memorandum, *supra* note 6; *id.* enclosure 4, Sample Sponsorship Agreement [hereinafter Sample Agreement].

[26] AR 215-1, para. 3-15.

[27] *See* Army Statement of Guidelines, *supra* note 10, para. *f*(1).

[28] *See* Zocchi, *supra* note 2, at 11-12.

[29] Sample Sponsorship Agreement, *supra* note 25, at 7.

[30] *See* CFSC Memorandum, *supra* note 6, para. 3*b*.

fare, and recreation activities overseas often advertise in the *Stars and Stripes* and these open advertisements do not amount to direct solicitation of defense contractors.

Another approach that some MWR activities have pursued has been to direct their solicitations generally to the *Fortune* 500 corporations. That only defense contractors normally will respond to these solicitations is irrelevant because the MWR activity's solicitation did not specifically *target* defense contractors. The key here is that sponsorship must be solicited competitively. This means that an MWR activity may not target a specific sponsor, particularly not if the prospective sponsor is a defense contractor.

A massive solicitation, however, may not be essential for minor events. In these cases, a smaller mailing to previous sponsors, local corporations, and other entities that reasonably might be expected to respond favorably should be sufficient to meet competition requirements without violating standards of conduct.

To comply with the standards of conduct, MWR activities not only should avoid targeting defense contractors, but also should avoid any suggestion of coercion. In one case, the German subsidiary of an American corporation, objecting to the loss of life in the Persian Gulf conflict, declined to sponsor a USAREUR welcome home celebration for soldiers returning from the Gulf. Morale, welfare, and recreation personnel proposed to contact the parent corporation in the United States to inform it of the position that its subsidiary had taken. Sending this message, however, would have served no legitimate purpose—it only would have created the appearance that the MWR activity was trying to punish the subsidiary for its refusal or to strong-arm the corporation into offering a sponsorship. A corporation must be absolutely free to decline invitations for sponsorship without fearing adverse consequences. Industrial participation in the commercial sponsorship program is voluntary and coercive tactics must be eschewed.

Army standards of conduct forbid Army military and civilian personnel from accepting gifts from defense contractors unless these gifts fall within certain restricted exceptions.[31] The commercial sponsorship program is not recognized specifically in the pertinent regulation. Its advantages, however, may be characterized as benefits generally offered the public or as discounts or concessions generally available to all Army military or civilian personnel. Thus, they may fall within the exceptions enumerated in the regulation.[32] In any event, the program conforms generally to the spirit of the ethical rules and has been found legally sufficient after repeated legal reviews.[33] Once the program has passed the test stage, the Department of the Army should include a specific exception in the regulation expressly authorizing Army personnel to accept benefits from defense contractors under the commercial sponsorship program.

Another, less obvious, standards of conduct issue may arise on occasion. As discussed above, MWR activities often seek to use drawings as fundraisers. A drawing, by definition, is a lottery—that is, a gambling activity.[34] Army standards of conduct expressly proscribe gambling on any government facility.[35] This prohibition extends to lotteries, pools, or games for money or property.[36] It applies whenever participants in an event must purchase something to enjoy a chance to win a benefit. Moreover, even when a sponsored event does not include a purchase requirement, a drawing is still a lottery to which standards of conduct prohibitions may apply.[37]

One exception, however, exists to the prohibition of on-post gambling. An activity that involves gambling may operate on a government installation if the Department of the Army has approved this activity as an exception to policy.[38] Army-approved activities include gambling conducted under MWR regulations.[39] Therefore, an MWR activity may hold a drawing if it complies with MWR regulations governing drawings. These regulations impose stringent requirements on MWR raffles[40] and, by implication, on MWR drawings in general.[41] Consequently, an MWR activity overseas may permit neither local nationals, nor American personnel dependents under the age of eighteen, to participate in a drawing.[42] Unless the Department of the Army amends the standards of conduct regulation or the MWR regulations to recog-

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[31] Army Reg. 600-50, Standards of Conduct for Department of the Army Personnel, para. 2-1*a* (28 Jan. 1988) [hereinafter AR 600-50].

[32] *Id.*

[33] Memorandum, Command Judge Advocate, U.S. Army Community and Family Support Center, 13 July 1989, subject: U.S. Army Community and Family Support Center Information (Issue #2), para. 2.

[34] Webster's Dictionary, *supra* note 8, at 687.

[35] AR 600-50, para. 2-2*a*(2).

[36] *Id.*, para. 2-7.

[37] Army Regulation (AR) 600-50 contains no requirement that a game participant must have made some financial outlay to participate in the lottery. Its test is whether the participants enter gambling activity in the hopes of receiving property or money. *See* AR 600-50, para. 2-7.

[38] *Id.*, para. 2-7*b*.

[39] *Id.*

[40] Army Reg. 215-2, The Management and Operation of Army Morale, Welfare, and Recreation Programs and Nonappropriated Fund Instrumentalities, para. 3-31.1 (10 Sept. 1990) [hereinafter AR 215-2].

[41] Webster's Dictionary, *supra* note 8, at 1874 (defining raffle); *id.* at 687 (defining drawing).

[42] AR 215-2, para. 3-31.1.

nize the unique nature of commercially sponsored drawings, the MWR regulatory restrictions will continue to control drawing participation.

Community Events

The last issue is not easily resolved. Indeed, it is ultimately unanswerable, absent additional guidance from either Headquarters, Department of the Army, or the Office of the Secretary of Defense. The initial memorandum from the Assistant Secretary of Defense authorized commercial sponsorship for morale, welfare and recreation events.[43] The Army memorandum that announced the program indicated at first that the program applied only to Army MWR events, but then remarked that the program was for "MWR *and community*" events.[44] The memorandum also endorsed various activities that include not only MWR events, but also activities run under other auspices—that is, for example, job fairs, and child abuse prevention month.[45] Precisely what constitutes a "community event" the Army memorandum left undefined.

The scope of "community event" becomes critical when administrative attorneys must determine the extent to which activities may obtain commercial sponsorship for events that are conducted under the auspices of an appropriated fund. In one community, for instance, planners reviewed a suggestion to obtain commercial sponsorship for Army Community Services' Consumer Awareness Week. Army Community Services, however, is an official appropriated fund activity.[46] Even if a consumer awareness week comprises the type of community event originally contemplated in the Army memorandum, may an installation obtain commercial sponsorship for a non-MWR event? Notably, commanders have rejected past suggestions for sponsorship for conferences, apparently concluding that conferences are ineligible for commercial sponsorship. This precedent, however, may not provide attorneys with a complete answer. Manifestly, a conference is neither an MWR activity, nor a "community event." What the correct answer might be when an appropriated fund activity, pursuant to its mission, plans to conduct a community event remains uncertain.

While an activity may want to tap into private funds to expand basic mission programs or to add special touches to existing programs, a lurking difficulty exists about reconciling using sponsorship for appropriated fund activities with a regulatory prohibition on the augmentation of appropriated funds. As a general rule, an appropriated fund activity may not augment its appropriations with funds from outside sources without specific statutory authority.[47] As a corollary, absent specific statutory authority, an agency must deposit any funds that it receives from outside sources—other than authorized repayments—into the General Fund of the Treasury.[48] The augmentation prohibition applies to direct dollar contributions and may include contributions of tangible items of property.[49] Any proposed commercial sponsorship of non-MWR "community" events that will provide additional funding, either directly through dollar contributions or indirectly through contributions of property, to an activity funded with appropriated funds, is of questionable legality. Yet, as noted above, the Army guidelines appear to anticipate exactly this sort of augmentation.[50] As long as the Department of the Army asserts that community events are eligible for commercial sponsorship, for subordinate offices legally to object to sponsorship for these events may be impossible. Nevertheless, caution does seem advisable whenever a proposed sponsorship will involve direct dollar contributions to programs that otherwise are paid for with appropriated funds. At some point, the Department of the Army should issue definitive guidance on sponsorship for that amorphous category of activities called "community events."

Conclusion

The commercial sponsorship program has been a great boon to MWR activities. It has allowed them to obtain not only benefits that are "nice to have," but also the essential donations that can make the difference between the success and the failure of an event. For the lawyer, however, or the MWR manager who must maximize the benefits of the program without running afoul of other regulatory restrictions, the program is a quagmire. Practitioners must inspect each piece of legal ground in front of them for solidity before taking a single step. These problems derive not only from the inadequacies of the guidance that the DOD originally disseminated, but also from external sources. Sharp corporate operators commonly see the sponsorship program as a way to evade rules with which they cannot, or will not, comply. Close coordination among the personnel who run the sponsorship program and extensive training are critical to the ethical, as well as the financial, success of the program.[51]

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[43] *See* ASD Memorandum, *supra* note 1.

[44] *Compare* CFSC Memorandum, *supra* note 6, para. 1 *with id.*, para. 3*a*.

[45] *See generally* CFSC Suggested Events, *supra* note 6.

[46] *See* Army Reg. 608-1, Army Community Service Program, para. 1-19*a*(1) (30 Oct. 1990); *id.*, ch. 9 (prescribing consumer affairs and financial assistance programs).

[47] Office of the General Counsel, U.S. Government Accounting Office Principles of Federal Appropriations Law, at 5-62 (1982) [hereinafter Principles of Federal Appropriations Law].

[48] *Id.* at 5-67 to 5-68. Federal statues do permit agencies to retain gifts. *See id.*, at 5-82; *see also* 10 U.S.C. § 2601 (1988) (authorizing Army appropriated fund activities to retain and use gifts). That the commercial sponsorship program fits under this gift exception to the augmentation prohibition is doubtful, however, because the sponsorship program contemplates not gifts, but mutual obligations pursuant to an agreement.

[49] The augmentation prohibition also can apply to "in kind" items. *See, e.g.*, Principles of Federal Appropriations Law, *supra* note 47, at 5-87.

[50] CFSC Suggested Events, *supra* note 6, suggested several community events that appear to fall within the purview of the appropriated fund mission. For example, the proposed child abuse prevention month would seem to fit within the mission of the Family Advocacy Program. *See* Army Reg. 608-18, The Army Family Advocacy Program, paras. 1-5*b* to 1-5*c* (18 Sept. 1987); *id.*, ch. 3, sec. I. Similarly, Armed Forces Day, for which the guidelines also suggest sponsorship, clearly is a community relations program. *See* Army Reg. 360-61, Community Relations, paras. 2-4 to 2-5 (15 Jan. 1987); *id.*, ch. 8.

[51] Zocchi, *supra* note 2, at 13.

Conducting Courts-Martial Rehearings

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Introduction

> The findings of guilty and the sentence are set aside. The record of trial is returned to The Judge Advocate General of the Army. A rehearing may be ordered.

Judge advocates normally find this phrase to be legally significant because it signals that an appellate court has overturned a conviction. It also may portend the creation of a new legal standard. On occasion, however, the phrase may take on a more immediate significance—that is, when the convening authority orders the staff judge advocate's office to proceed with the rehearing.

Generally, the procedure for conducting a rehearing is "the same as in an original trial."[1] The Manual for Courts-Martial provides a few rules that relate specifically to rehearings.[2] For the most part, however, a judge advocate must derive his or her guidance solely from existing case law.

This article provides a framework for conducting a rehearing. It outlines traps and tips, it describes the special rules for rehearings, it offers practical advice on locating witnesses and evidence, and it discusses the many options for advocacy that are available at rehearings to both the trial counsel and the defense counsel.

Types of Rehearings

Generally, rehearings come in three varieties: full rehearings, sentence rehearings, and limited evidentiary hearings. An appellate court usually will order a full rehearing when it finds prejudicial error occurred before the sentencing phase—that is, for example, when it finds that the accused entered an improvident guilty plea;[3] that the trial judge erroneously admitted evidence on findings[4] or erroneously denied a challenge for cause against a panel member;[5] that unlawful command influence tainted a trial on the merits;[6] or that some other prejudicial error occurred before the trial court announced its findings.[7]

In a sentence rehearing, the appellate court upholds the accused's conviction, but orders a second sentencing hearing to correct an error that occurred in the sentencing phase of the original trial. An appellate court generally will order a sentence rehearing when it finds that the trial court erroneously admitted evidence at sentencing;[8] that the accused entered a provident guilty plea, but the sentencing phase of the trial was tainted by unlawful command influence;[9] or that any other prejudicial error arose that affected the sentencing phase of the trial.[10] A sentence rehearing opens with the usual jurisdictional material appearing in the "script" set forth in the Military Judge's Benchbook,[11] but then proceeds directly to the sentencing phase of the trial, starting with the information on page one of the charge sheet.

The third type of rehearing is the most unique. In *United States v. DuBay*[12] the Court of Military Appeals established the procedure governing limited evidentiary hearings. It created this procedure to eliminate "the unsatisfactory alternative of settling [an] issue on the basis of ex parte affidavits, amidst a barrage of claims and counterclaims."[13] The court declared,

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[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 810(a)(1) [hereinafter R.C.M.].

[2] *See, e.g.*, R.C.M. 810 (d)(1) (limiting maximum sentence that may be imposed on rehearing); R.C.M. 810 (d)(2) (extending effect of prior pretrial agreement to subsequent rehearing).

[3] *See, e.g.*, United States v. Byrd, 24 M.J. 286 (C.M.A. 1987); United States v. Dock, 26 M.J. 620 (A.C.M.R. 1988), *aff'd*, 28 M.J. 117 (C.M.A. 1989); United States v. Brooks, 26 M.J. 930 (A.C.M.R. 1988).

[4] *See, e.g.*, United States v. Whitehead, 26 M.J. 613 (A.C.M.R. 1988).

[5] *See* United States v. Arnold, 26 M.J. 965 (A.C.M.R. 1988); United States v. Anderson, 23 M.J. 894 (A.C.M.R. 1987).

[6] *See, e.g.*, United States v. Levite, 25 M.J. 334 (C.M.A. 1987).

[7] *See, e.g.*, United States v. Scott, 24 M.J. 186 (C.M.A. 1987) (ineffective assistance of counsel); United States v. Johnson, 24 M.J. 101 (C.M.A. 1987) (inadequate jury instructions).

[8] *See* United States v. King, 29 M.J. 885 (A.C.M.R. 1989).

[9] *See, e.g.*, United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984).

[10] *See, e.g.*, United States v. Webster, 24 M.J. 96 (C.M.A. 1987) (ordering rehearing after finding military judge erroneously denied as "untimely" accused's request for judge-alone sentencing after accused entered a guilty plea); United States v. Torres, 25 M.J. 555 (A.C.M.R. 1987) (ordering rehearing after finding military judge denied accused adequate voir dire after guilty plea and before sentencing by members), *petition for review denied*, 27 M.J. 466 (C.M.A. 1988).

[11] Dep't of Army, Pam. 27-9, Military Judges' Benchbook (1 May 1982).

[12] 37 C.M.R. 411 (C.M.A. 1967).

[13] *Id.* at 413.

> In each such case, the record will be remanded to a convening authority other than the one who appointed the court-martial concerned and one who is at a higher echelon of command. That convening authority will refer the record to a general court-martial for another trial. Upon convening the court, the [military judge] will order an out-of-court hearing, in which he [or she] will hear the respective contentions of the parties on the question, permit the presentation of witnesses and evidence in support thereof, and enter findings of fact and conclusions of law based thereon.[14]

In most cases, an appellate court will order a *DuBay* hearing to examine issues that the accused raised for the first time on appeal[15] or that simply require additional evidence.[16]

Speedy Trial

The Rules for Courts-Martial (R.C.M.) state that the speedy trial clock is triggered when the accused receives notice of the preferral of charges or is subjected to pretrial restraint.[17] When, in an order or opinion setting aside an accused's conviction, an appellate court authorizes rehearing on the charges, the original preferral date survives for purposes of computing speedy trial limitations. The convening authority cannot restart the clock by preferring charges a second time. Rather, he or she must hold the rehearing that follows the appellate reversal of the conviction within 120 days of "the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing."[18] The trial counsel, therefore, should ensure that these documents are date-stamped upon arrival and should note these dates on the case status sheet to mark the beginning of the speedy trial period.

An accused may not be held in posttrial confinement after his or her conviction has been overturned. Even if the accused is dangerous or a flight risk, the commander must not leave the accused in adjudged confinement status.[19] Instead, the commander should place the accused in pretrial confinement awaiting rehearing, just as he or she would do in a case of original jurisdiction.

When a commander moves an accused from confinement as an adjudged prisoner to pretrial confinement awaiting rehearing, the speedy trial rule governs exactly as it would in an original case. In *United States v. Flint*[20] the Court of Military Appeals expressly extended the ninety-day speedy trial limitation of *United States v. Burton*[21] to rehearings for individuals placed in pretrial confinement.[22]

Addressing the speedy trial issue is more difficult in sentence rehearings and in *DuBay* limited evidentiary hearings than in full rehearings. In resentencing and *DuBay* proceedings the accused already has had his or her day in court and the findings of guilty remain undisturbed. Obviously, defense counsel cannot apply the speedy trial requirements of R.C.M. 707 to these hearings. In *United States v. Flint* the Army Court of Military Review noted in a well-reasoned analysis that *DuBay* hearings are not rehearings, but actually are part of the appellate process. Accordingly, the court decided that *DuBay* hearings must comply with the standard of appellate timeliness rather than with the speedy trial rules now outlined in R.C.M. 707.[23] On review, the Court of Military Appeals adopted the Army court's analysis and

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[14] *Id.*

[15] *See, e.g., id.* at 411 (postconviction claim of unlawful command influence); United States v. Cruz, 25 M.J. 326 (C.M.A. 1987) (unlawful command influence); United States v. Walker 25 M.J. 713 (A.C.M.R. 1987) (posttrial assertion of an insanity defense); *accord* United States v. King 24 M.J. 774, 781-83 (A.C.M.R. 1987).

[16] *See, e.g.*, United States v. Ultsch, 27 M.J. 5 (C.M.R. 1988) (ordering *DuBay* hearing to determine whether sufficient new evidence existed to warrant new trial); United States v. Miller, 27 M.J. 191 (C.M.A. 1988) (ordering *DuBay* hearing to investigate allegations of prosecutorial misconduct); United States v. Gipson, 24 M.J. 246 (C.M.A. 1987) (ordering *DuBay* hearing to allow defense to lay foundation for polygraph evidence).

[17] R.C.M. 707(a).

[18] R.C.M. 707(b)(3)(D) (C5, 6 July 1991); *see also* United States v. McFarlin, 24 M.J. 631, 635 (A.C.M.R. 1987). Although the confinement facility typically is the first government agency to be notified of the decision authorizing the rehearing, the addition of R.C.M. 707(b)(3)(D) eliminated the confusion that previously had existed over whether notifying the confinement facility triggers the speedy trial clock.

[19] R.C.M. 304(f) prohibits the punishment of persons who are restrained pending trial and requires military authorities to treat pretrial prisoners in accordance with pertinent military regulations. Army Regulation 190-47 requires confinement facility personnel to segregate accused that have been placed in pretrial confinement from sentenced prisoners to the maximum extent possible. Dep't of Army, Reg. 190-47, The United States Army Correctional System, para. 4-6d (1 Oct. 1978).

[20] 1 M.J. 428 (C.M.A. 1976).

[21] *See* United States v. Burton, 44 C.M.R. 166 (1971).

[22] Although change 5 to R.C.M. 707 purports to eliminate the 90-day speedy trial rule for confined individuals, prudent trial counsel will keep within the 90-day *Burton* limit until the issue is tested before the Court of Military Appeals. *See* R.C.M. 707 discussion (C5, 6 July 1991).

[23] United States v. Flint, 50 C.M.R. 865 (A.C.M.R. 1975), *aff'd*, 1 M.J. 428 (C.M.A. 1976). Under the standard for appellate timeliness, an appellate court will grant relief to accused only when the government's delays evince "a flagrant disregard of his [or her] rights." *See id.* at 871.

exempted *DuBay* hearings from the *Burton* speedy trial rule.[24]

Opinions that express the speedy trial requirements of sentence rehearings appear in only a few cases. In *Flint*, for instance, the Court of Military Appeals applied the ninety-day rule to the sentence rehearing of an accused who had remained in confinement after an appellate court had overturned his original sentence.[25] Military appeals courts, however, have applied no similar rule when an individual awaiting rehearing was not confined. To the contrary, in *United States v. Giles* the Navy Court of Military Review actually found R.C.M. 707 to be *inapplicable* to rehearings on sentences "because [the rule] provides that an accused is brought to trial ... when a plea of guilty is entered to an offense or presentation to the fact-finder of evidence on the merits begins."[26] The court reasoned that neither a guilty plea, nor a presentation on the merits, occurs at the sentence rehearing; rather, both carry over from the original trial.[27] *Giles*, however, is not binding authority for Army courts. An Army trial counsel's safest course is to hold sentence rehearings within the 120-day period mandated for original trials.

Another speedy trial problem arises when an appellate court returns a case to the military judge for a *DuBay* hearing, but authorizes the judge to conduct a full rehearing, or a sentence rehearing if a *DuBay* hearing proves impracticable.[28] A *DuBay* hearing, of course, need not comply with speedy trial rules—but a rehearing must. Nevertheless, no rule clearly discloses when the speedy trial clock starts if a convening authority chooses to conduct a rehearing rather than a *DuBay* hearing. Two possible alternatives present themselves: (1) the court could compute speedy trial limitations from the date that the convening authority determines that the *DuBay* hearing is impracticable; or (2) the court could find that the speedy trial clock started when the Government received the case from the appellate court.

In practice, judge advocates generally have relied on the former procedure, reasoning that the case remains in the appellate process until the convening authority actually determines that a *DuBay* hearing is impracticable. Only after the convening authority decides to hold a rehearing is the accused again in jeopardy; thus, only then is he or she entitled to the speedy trial protection of R.C.M. 707.

Recent changes to the speedy trial rule, however, may lend support to the second analysis. Change 5 to the Manual for Courts-Martial added language to R.C.M. 707, stating that the 120-day period begins when the "convening authority receives the record of trial and the opinion *authorizing* or directing a rehearing."[29] Although the drafters probably did not intend to apply this "authorizing" language to the situation described above, the revised rule reasonably can be read to require the government to conduct a rehearing within 120 days of the date the case is received, regardless of when the convening authority actually determines that a *DuBay* hearing is impracticable. To resolve this issue, counsel should read each court opinion carefully. Typically, when an appellate court returns a case under these circumstances, it will use language such as, "if the convening authority determines that ... a [*DuBay*] hearing is impracticable, he [or she] may order a rehearing on sentence,"[30] or "[i]f the convening authority to whom the case is referred determines a limited hearing ... is impracticable, he [or she] may order a rehearing on [the] sentence."[31] Given this language, a defense counsel certainly can argue that the

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[24] *Flint*, 1 M.J. at 428.

[25] *Id.* at 429.

[26] 20 M.J. 937, 938 (N.M.C.M.R. 1985), *petition for review denied*, 21 M.J. 388 (C.M.A. 1985).

[27] *Giles*, 20 M.J. at 938.

[28] For example, a court could return a case to the convening authority with an order to conduct a *DuBay* limited evidentiary hearing to determine whether the court members were subjected to unlawful command influence, but also might authorize the convening authority to order a full or sentence rehearing instead, if he or she finds that a *DuBay* hearing would be impracticable. A convening authority might eschew a *DuBay* hearing for a number of reasons. For example, if the trial counsel contacts some of the prior court members—who would be witnesses at the *DuBay* hearing—and these court members indicate that they will testify that they were subjected to unlawful command influence, conducting a *DuBay* hearing would be a waste of time and resources. Similarly, if counsel can call fewer witnesses at a rehearing than they would have to call for the *DuBay* hearing, the convening authority might conclude that a rehearing would be easier and more cost effective than, and thus preferable to, a *DuBay* proceeding. *See e.g.*, United States v. Ferguson, 23 M.J. 275 (C.M.A 1986); United States v. Montesinos, 21 M.J. 679, 683 (A.C.M.R. 1985).

[29] R.C.M. 707(b)(3)(D) (C5, 6 July 1991) (emphasis added).

[30] *Montesinos*, 21 M.J. at 679.

[31] *Ferguson*, 23 M.J. at 275; *see also* United States v. Andrus, 26 M.J. 39 (C.M.A. 1988) ("The record of trial is returned to the Judge Advocate General of the Army for transmission to an appropriate officer exercising general court-martial jurisdiction who may order a fact finding hearing or, if that officer determines such a hearing impracticable, set aside the sentence and order a rehearing as to sentence"); United States v. Kitts, 23 M.J. 105, 109 (C.M.A. 1986) ("In the event the convening authority to whom the case is referred determines a limited hearing ... is impracticable, he [or she] may order a rehearing on sentence"); United States v. Brown, 21 M.J. 625, 627 (A.C.M.R. 1985) ("In the event the convening authority to whom the case is referred deems a limited hearing ... to be impracticable, he [or she] will set aside the findings and sentence and either order a rehearing or dismiss the charges").

court order "authorized" a rehearing and that the 120-day period began when the convening authority first received the case.

Evidentiary Considerations

A trial counsel's first task in processing a rehearing is to determine whether the case actually can be retried. Normally, this decision will hinge on whether the trial counsel can locate necessary witnesses and evidence. When an appellate court orders a *DuBay* hearing, it usually will provide counsel with specific guidance on what evidence is needed.[32] The trial and defense counsel need only find the witnesses or other evidence that the court order requires. For a full rehearing or sentence rehearing, however, the trial counsel and defense counsel must review the record and the investigative files to determine what evidence they will need and which witnesses they must locate.[33] Moreover, if the appellate court excluded evidence on appeal, the trial counsel also must reevaluate the case and search for possible investigative leads to replace the excluded evidence.

Counsel never should assume that a rehearing will be "just like the first trial." Although this may be true in some cases, counsel more commonly will discover that the appellate court has excluded key evidence or that important witnesses have disappeared or have forgotten the details of their testimonies.[34] Furthermore, new opposing counsel may have brought fresh, and perhaps better, theories to the case. Accordingly, attorneys for both the defense and the prosecution should prepare each case much like an original trial. They should rely on previous records only on the rare occasions when that truly is the best way to handle the case.

When a trial counsel learns that a case must proceed to rehearing, he or she should contact the local Criminal Investigation Command (CID) office immediately to request a copy of the investigative file, as well as any essential physical evidence that relates to the case.[35] This is a fairly simple, but potentially time-consuming, process. The defense counsel should make his or her discovery requests as early as possible to allow for the time needed physically to transfer evidence and documents.[36]

Locating Witnesses

For both the trial counsel and the defense counsel, locating witnesses may be the most troublesome aspect of conducting a rehearing. This task, however, is inescapable. Counsel may present a witness's prior testimony on findings only if the witness is unavailable to testify at the current proceedings.[37] Witnesses occasionally will be unavailable. To prove this, an attorney should keep a detailed record of the measures he or she takes to locate each witness.

Counsel should begin any search for a witness with a thorough examination of the record of trial. In the record, an observant counsel or legal specialist can find the full name and social security number of each witness, as well as other clues that could prove helpful in a search.[38] To find active duty and retired soldiers, counsel also should check world-wide locator services, the Defense Enrollment Eligibility Reporting System (DEERS) computer,[39] and the appropriate military pay facility. To obtain information on Reserve soldiers or to obtain copies of the personnel files of individuals no longer serving with the military, counsel may need to contact the Army Reserve Personnel Center at St. Louis.[40] A personnel file can be a

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[32] *See generally Gipson*, 24 M.J. at 254 (ordering *DuBay* proceedings to lay foundation for introduction of polygraph evidence); *King*, 24 M.J. at 781 (ordering *DuBay* proceeding to examine possible insanity defense).

[33] Counsel should recognize the difficulty of judging the credibility and weight of a witness's testimony if one has no opportunity to meet the witness until the day before the trial. When in doubt, counsel should contact the previous trial or defense counsel for advice. In close cases, an attorney should apply the adage, "better safe than sorry," when deciding whether or not to arrange for a witness to travel. If the counsel must change his or her trial strategy unexpectedly, sending a witness home is much easier than producing one at the last minute.

[34] The Military Rules of Evidence permit an attorney to use prior testimony to refresh a witness's recollection, or to introduce it into evidence because memory loss has rendered the witness "unavailable." *See* Manual for Courts-Martial, United States, 1984, Military Rules of Evidence [hereinafter Mil. R. Evid.] 612, 804. This use of evidence, however, usually is not as effective as live testimony.

[35] Trial counsel should contact the local Criminal Investigation Command (CID) office to request the transfer of evidence. The CID then will ask permission to transfer the evidence permanently to its evidence room, in accordance with Army Regulation 195-5. *See* Dep't of the Army Reg. 195-5, Evidence Procedures, para. 2-7*i* (15 Oct. 1981).

[36] *See generally* R.C.M. 701.

[37] Mil R. Evid. 804(b)(1); *see also* United States v. Burns, 27 M.J. 92 (C.M.A. 1988) (establishing very stringent rule for showing a witness is unavailable). Even if a witness's prior testimony is admissible under Military Rule of Evidence 803—which permits the military judge to admit some forms of prior testimony without a showing that the witness is presently unavailable—the former testimony is still hearsay and the proponent of the evidence must demonstrate an independent basis for admissibility. *See* Mil. R. Evid. 805.

[38] The record of trial can show whether the witness is on active duty, soon to leave military service, retired, or a civilian. Counsel also may find references to the witness's home town and place of employment, or to other persons who may know the witness's whereabouts.

[39] This computer system can be accessed most easily through the identification card section of the local adjutant general's office.

[40] Investigating the records archives can be a very lengthy process. Sufficient lead-time is essential to successful research. If an attorney must review several records, he or she should consider sending an investigator or legal clerk to review the files in St. Louis. If counsel needs personnel information about a witness belonging to another military service, he or she may contact the appropriate Air Force, Navy, or Marine Corps liaison office in St. Louis.

useful investigative tool. It may not reveal a former soldier's exact whereabouts, but it will contain the individual's home of record and his or her emergency notification and designation of beneficiary forms—documents that usually list the addresses of the former soldier's close friends and relatives.

If these efforts fail, counsel should enlist the support of the CID. An attorney often can turn up useful information with the help of agents stationed near the witness's home town. Counsel also may contact the Internal Revenue Service (IRS). The IRS will not reveal a taxpayer's address without a federal court order; however, it will forward a letter to a taxpayer's last known address if an attorney provides it with the individual's name and social security number.[41] This process is time consuming and is not always productive. It will help to demonstrate to a military court, however, that the attorney has made every reasonable effort to locate a given witness.[42]

Sentencing Evidence

When preparing for the sentencing phase of a rehearing, both the trial counsel and the defense counsel should start fresh. The sentencing evidence should give the court an up-to-date picture of the accused, rather than simply portraying the accused as he or she was at the original trial. Counsel should find a wealth of new sentencing evidence at rehearings, especially with respect to the accused's rehabilitative potential.[43] In particular, both the trial and defense counsel should ask the correctional facility for a chance to review the accused's correctional treatment file. This file contains information about the accused's behavior in confinement, describes any treatment or rehabilitation programs he or she may have entered, and includes work performance evaluations of the accused by the military guards.[44]

During sentence rehearings, counsel may present evidence from the findings portion of the original record of trial.[45] The hearsay prohibition does not apply to this evidence;[46] therefore, the Government and the defense may put before the court "any evidence properly introduced on the merits before findings,"[47] without actually producing the witnesses or the evidence.

Case Processing Options

Every experienced trial and defense counsel has a mental list of methods for processing cases. Some attorneys begin negotiations for a guilty plea or a discharge for the good of the service[48] even before charges formally are preferred. When an attorney faces a rehearing, however, many of his or her usual processing options will not work. A new approach then may be worth a try.

All the options available to counsel at an original trial are available in a full rehearing. If an accused originally pleaded guilty in accordance with a pretrial agreement, that same agreement will control the maximum sentence at the rehearing if the accused pleads guilty again.[49]

In a sentence rehearing on a case that the parties originally settled by pretrial agreement, the accused still may claim the benefits of the original agreement.[50] In a sentence or a full rehearing, however, an accused may be able to negotiate a better sentencing agreement in exchange for his or her promise to call a limited number

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[41] Counsel should contact the nearest IRS office to inquire about the current procedure for sending letters to locate witnesses.

[42] *See generally* United States v. Burns, 27 M.J. 92 (C.M.A. 1988).

[43] *See generally* R.C.M. 1001. One line of cases clearly reveals the desire of the Court of Military Appeals to prevent commanders and other Government witnesses from offering unsupported "lack of rehabilitative potential" evidence in original trials. *See, e.g.*, United States v. Claxton, 32 M.J. 159 (C.M.A. 1991); United States v. Aurich, 31 M.J. 95 (C.M.A. 1990); United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989); United States v. Wingart, 27 M.J. 128 (C.M.A. 1988). At a rehearing, however, either attorney may present evidence to show the accused's actual progress in rehabilitative programs at the confinement facility. For example, counsel may present official certificates of completion from counselling programs, or call correctional treatment specialists or counselors to testify on the accused's rehabilitative progress—or lack thereof—provided that they comply with the foundation and scope limitations defined in *Claxton* and *Ohrt*. *See generally Claxton*, 32 M.J. 161-62; *Ohrt*, 28 M.J. at 303-04.

[44] Before using information from the accused's correctional treatment file, counsel should consider the developing line of cases restricting the use of this evidence during the sentencing phase of trial. *See* United States v. Fontenot, 29 M.J. 244, 248 n.3 (C.M.A. 1989); United States v. King, 29 M.J. 885 (A.C.M.R. 1989).

[45] R.C.M. 810(a)(2)(A).

[46] *See id.* ("The contents of the record of the original trial, consisting of evidence properly admitted on the merits relating to any offense of which the accused stands convicted but not sentenced may be established ... whether or not testimony so read is otherwise admissible under Military Rule of Evidence 804(b)(1) ....").

[47] R.C.M. 1001(f)(2).

[48] *See* Dep't of Army Reg. 635-200, Personnel Separations: Enlisted Personnel, ch. 10 (15 Dec. 1988) [hereinafter AR 635-200].

[49] *See* R.C.M. 810(d)(2) (providing sentence limitation rules for rehearings and rules to be applied if accused fails to comply with prior pretrial agreement).

[50] *Id.* To receive the benefit of the agreement, the accused must comply with its terms. At a sentence rehearing, the accused's original guilty plea stands, though the accused may incur additional obligations, such as stipulating to facts or to expected testimony. *Id.*

of sentencing witnesses or to rely more extensively on prior testimony or stipulations of expected testimony.[51]

A discharge under the provisions of chapter 10 of Army Regulation 635-200[52] is another way that counsel can resolve a case at a sentence or full rehearing.[53] A chapter 10 discharge can be a very favorable option for an accused facing a full rehearing because this discharge will erase the accused's prior federal conviction. Significantly, a chapter 10 discharge will not negate an affirmed finding of guilt at a sentence rehearing.[54] Nevertheless, an accused still may benefit from accepting a separation under chapter 10. If the accused accepts a chapter 10 discharge at a full or sentence rehearing, he or she may claim back-pay from the date of the convening authority's original action.[55]

At first glance, trial counsel may see this as a compelling reason to urge the convening authority *not* to accept an accused's chapter 10 request. The trial counsel, however, should balance the amount of back-pay the accused will receive against the cost of retrying the case—bearing in mind any new evidentiary problems that may have arisen following the appeal. To separate the accused under chapter 10 well may benefit both parties.

Procedure and Jurisdiction

The process for getting a rehearing into court generally follows the rule that "the procedure shall be the same as in an original trial."[56] Some procedures, however, may differ. As the Army Court of Military Review pointed out in *United States v. McFarlin*, the original preferral and notification to the accused still stand.[57] Moreover, the convening authority need not order a second article 32 investigation for the rehearing.[58] Normally, he or she need only refer the case to a new court-martial,[59] after which the accused may be served with the charges.

At a rehearing, the trial counsel must lay a foundation for the court's jurisdiction over the case and the accused. The court's jurisdiction in a rehearing derives from the appellate court's order for a rehearing, and from The Judge Advocate General's order sending the case to that particular convening authority. The trial counsel should introduce these orders at trial as appellate exhibits. In addition, counsel must include in the record any orders recalling the accused to active duty, or assigning the accused to the court-martial jurisdiction.[60]

Maximum Sentence

The Supreme Court has placed no limit on sentences imposed at rehearings.[61] Congress, however, holds the military to a more restrictive rule. The Uniform Code of Military Justice states that "no sentence in excess of or more severe than the original sentence may be imposed unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory."[62] Furthermore, specific rules govern the allowable punishments at a rehearing[63] and sharply limit the convening authority's discretion.[64]

Rule for Courts-Martial 810 declares that, in a rehearing, a sentence may not exceed the original sentence as "ultimately reduced by the convening or higher authority."[65] A sentence, however, may dwindle for a number of reasons as a case winds its way through the military justice system. The convening authority may reduce the sentence, an appellate court may reassess it, or the government may remit it during the accused's confinement. By the time the case proceeds to the rehearing, counsel may have considerable difficulty determining exactly what the "new" maximum sentence should be.

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[51] The trial counsel should examine R.C.M. 1001(e)(2) carefully before bargaining with the defense over sentencing witnesses. R.C.M. 1001(e)(2) provides a balancing test to determine whether the Government must produce a sentencing witness. The cost to the Government to produce a witness at a rehearing is usually greater than it would be at trial, and at a rehearing the witness's prior sworn testimony often will suffice.

[52] *See* AR 635-200, ch. 10.

[53] *See* United States v. Sala, 30 M.J. 813 (A.C.M.R. 1990) (holding that convening authority may accept chapter 10, but must approve sentence of no confinement along with chapter 10 discharge); *cf.* United States v. Montesinos, 28 M.J. 38, 43-45 (C.M.A. 1989) (holding that an order remanding case to convening authority for sentence rehearing does not empower convening authority to set aside approved findings of guilty; convening authority, however, may approve accused's request for chapter 10 discharge if he or she can do so without affecting the findings).

[54] *Montesinos*, 28 M.J. at 43-44.

[55] Dep't of Defense, Military Pay and Allowances-Entitlements Manual, para. 70,509*a* (Mar. 9, 1987). Back-pay due when an accused receives a chapter 10 discharge on rehearing usually ranges from $8000 to $30,000, although the author once saw an accused receive $140,000. Defense counsel, however, should remember that if the accused was not confined pending rehearing, the accused's back-pay will be offset by any money the accused earned as a civilian.

[56] R.C.M. 810(a)(1).

[57] *McFarlin*, 24 M.J. at 634.

[58] *See* Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1988) [hereinafter UCMJ]; *see also* R.C.M. 405.

[59] *See* R.C.M. 810(b) (describing the composition of the court at rehearing).

[60] *See McFarlin*, 24 M.J. at 633 n.2.

[61] *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711 (1969).

[62] UCMJ art. 63.

[63] R.C.M. 810(d)(1). An accused's punishment upon rehearing not be "in excess of or more severe than the legal sentence adjudged at the previous trial or hearing, as ultimately reduced by the convening or higher authority." *Id.*

[64] R.C.M. 1107(f)(5). The convening authority not only is subject to the sentencing limitations set out in R.C.M. 810, but also must ensure that the accused is placed in as good a position as the accused would have enjoyed under any prior actions. *See id.*

[65] R.C.M. 810(d)(1).

Commonly, the crucial question that counsel must resolve is whether a sentence "ultimately" was reduced when the sentence reduction involved was not a sufficient remedy and a higher court subsequently set aside the conviction or the sentence on appeal. In one early case, the Court of Military Appeals expressed the standard for these intermediate reductions, stating that

> the maximum sentence which may be adjudged on any rehearing is limited to the lowest quantum of punishment approved by a convening authority, board or review, or other authorized officer under the Code, prior to the second trial, unless the reduction is expressly and solely predicated on an erroneous conclusion of law.[66]

This standard is not always easy to apply; however, it is virtually the only guidance an attorney can find in this sometimes complex area of sentencing.[67]

Once the defense counsel, the trial counsel, and the military judge reach a consensus on the maximum sentence that may be imposed, the military judge must instruct the members of the court on sentencing. The judge, however, has very little guidance on what sentencing instructions he or she should provide. The Military Judges' Benchbook contains no sentencing instructions for rehearings, and the directions provided by the Manual for Courts-Martial[68] are, at best, contradictory. Currently, most military judges simply disclose "new" maximum punishments to the members without further explanation because case law forbids a judge to tell the members that the new sentencing limits derive from sentences imposed at a prior court-martial.[69]

Conclusion

In many ways rehearing practice is much like conducting an original court-martial. Some unexpected traps, however, await the uninformed trial or defense counsel. Case evaluations, locating witnesses and evidence, speedy trial concerns, and effective case disposition all are affected by new and often ambiguous rules. In courts-martial, adequate preparation is often the key to success. In a rehearing, adequate and timely preparation is the key to survival. Without a clear understanding of the many new rules of the game, counsel cannot hope to succeed. With sufficient information, however, and with skills honed at "ordinary" courts-martial, counsel can meet and overcome these new rehearing challenges.

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[66] United States v. Jones, 28 C.M.R. 98, 99 (C.M.A. 1959).

[67] *See generally* United States v. Murphy, 23 M.J. 862 (A.C.M.R. 1987) (providing good examples of many factors that can reduce a maximum sentence and demonstrating the difficulties of applying the *Jones* standard).

[68] *See* R.C.M. 810 discussion; *id.* analysis, app. 21, at A21-43 to 21-44.

[69] *See* United States v. Eschmann, 28 C.M.R. 288 (C.M.A. 1959).

Value Engineering Change Proposals: A Model for Addressing Multiple Submittals

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Introduction

Value engineering is an established facet of federal procurement.[1] Section 48.201 of the Federal Acquisition Regulation (FAR) requires a contracting officer to include a value engineering incentive (VEI) clause in any contract with a value expected to exceed $100,000, unless the contract is of a type that the regulation specifically exempts from this requirement.[2] Most procurement activities have established value engineering programs to ease the submission, evaluation, and quantification of

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[1] Department of Defense Directive 4245.8 defines value engineering as "an organized effort directed at analyzing the function of systems, equipment, facilities, services, and supplies for the purpose of achieving essential functions at the lowest life-cycle cost consistent with required performance, reliability, maintainability, interchangeability, product quality, and safety." *See* Dep't of Defense Directive 4245.8, Department of Defense Value Engineering Program, para. C (1) (Nov. 19, 1986) [hereinafter DOD Dir. 4245.8].

[2] The precise language of the appropriate clause varies according to the type of contract involved. *See* Fed. Acquisition Reg. 48.201 (1 Apr. 1984) [hereinafter FAR]; FAR 52.248-1; FAR 58.248-2. In unusual situations, contracting officers may request relief from value engineering requirements from the Federal Acquisition Regulation or Defense Acquisition Regulation Councils in accordance with FAR 1.403. Given the widespread support for value engineering within the Department of Defense, requests for deviations should be rare.

value engineering change proposals (VECPs).[3] Although contracting personnel largely have succeeded in making value engineering an integral part of contract administration, one recurring area of confusion remains. This confusion arises when two or more different contractors submit essentially similar VECPs to the same contracting activity at approximately the same time. Over the past four years this scenario has resulted in several reported cases. The FAR, however, provides contracting officers with no guidance whatsoever for handling similar, contemporaneous VECPs.[4]

Fortunately, contracting officers can glean cogent guidance on this point from recent case law. Although these decisions are far from consistent, they appear to evince a developing consensus among the courts and administrative boards that the policy objectives underlying the value engineering program are best served by apportioning value engineering savings awards among multiple VECP submitters. In light of the emerging body of law on this issue, the time is ripe to amend the FAR to provide concrete regulatory guidance to procuring activities for addressing simultaneous VECP submittals.

The Problem

To comply with established policy guidelines that encourage competition in contracting, contracting officers normally apportion procurements of supplies among several contractors simultaneously.[5] This fragmentation enhances competition and—in appropriate cases—serves other policy goals, such as maintaining a strong defense industrial base.[6] Not surprisingly, when several contractors are engaged simultaneously in delivering identical items to the government, they often independently submit similar VECPs to the same procuring activity in the same general time frame. To date, however, contracting personnel have not developed a consistent rationale for disposing of substantially similar VECP submissions, as the cases discussed below amply demonstrate.[7]

A series of decisions by the Armed Services Board of Contract Appeals (the Board), emphasize that the dates of submission of substantially similar VECPs are critical. If one VECP clearly predates another, the Board normally will find that the earlier submittal is entitled to a preference and will award the entire available savings award to the contractor that submitted the first VECP. The Board displayed this predilection clearly in *Gulf Apparel Corp.*[8] Gulf Apparel and a competitor, Propper, both manufactured camouflage fatigues. On 30 December 1980, Gulf Apparel submitted a VECP proposing that "bleachery seconds" material be used for making hanging pockets and hip pockets—that is, for areas of military uniforms that normally are not visible.[9] Bleachery seconds are identical in composition to the normal camouflage uniform fabric but differ in appearance because of various coloring defects.[10] The material, for instance, may be dyed only in "ground shade," a light green color that manufacturers apply to fabric before overprinting it with camouflage patterns.[11] Gulf Apparel's plan to use bleachery seconds would reduce the cost of uniforms because seconds are less expensive than the higher quality camouflage material then required by relevant specifications.[12]

On 21 January 1981, Propper also submitted a VECP. Propper's proposal suggested that manufacturers use "natural or solid" colored material for hanging pockets and hip pockets.[13] After examining the competing VECPs, government technical authorities tentatively approved both on 10 June 1981.[14] On 6 July 1981, the government formally approved Propper's VECP[15] and on

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[3] Department of Defense Directive 4245.8 requires the Assistant Secretary of Defense (Acquisition and Logistics) to manage the Department's value engineering program. Within the Army, Army Regulation 5-4 further vests managerial responsibility jointly in the Secretary of the Army, Financial Management (SAFM) and the Secretary of the Army, Research, Development, and Acquisition (SARDA). *See* Army Reg. 5-4, Department of the Army Productivity Improvement Program, para. 4-7 (18 Aug. 1976). These offices have promulgated policy guidance throughout the Army Material Command in Army Material Command Regulation 70-8 and in various informal publications. *See generally* Army Material Command Reg. 70-8, Value Engineering Program (19 May 1987); Army Material Command, U.S. Army, United States Army Material Command Value Engineering Program Guide (Jan. 1989) [hereinafter Value Engineering Program Guide].

[4] *See, e.g.*, FAR 48.102 to .104-1, 52.248-1 to -3. Expert guidance in responding to VECPs is a key part of any value engineering program. *See* Value Engineering Program Guide, *supra* note 3, sec. V, at 5.

[5] *See* FAR 6.202 (allowing agencies to establish and maintain alternate sources of supplies and services to increase competition or to facilitate industrial mobilization).

[6] *See generally* Staff of Defense Industrial Base Panel, House Comm. on Armed Services, 96th Cong., 2d Sess., The Ailing Defense Industrial Base: Unready for Crisis, at 35 (Comm. Print 1980).

[7] In discussing the problems associated with similar VECP submissions, this article will not attempt to distinguish between collateral value engineering savings as opposed to acquisition value engineering savings. Although this distinction is important in terms of the quantum of a particular value engineering savings award, the methodology for apportioning a savings award among competing VECP submitters suggested herein would be the same regardless of the type of savings involved.

[8] ASBCA No. 27,784, 89-2 B.C.A. (CCH) ¶ 21,735 (Mar. 1, 1989).

[9] *Id.* at 109,261.

[10] *Id.* at 109,265.

[11] *Id.*

[12] *Id.* at 109,261.

[13] *Id.* at 109,264.

[14] *Id.* at 109,265.

[15] *Id.* at 109,267.

15 July 1981, the contracting officer informed Gulf Apparel that the government had accepted both the Gulf Apparel and the Propper VECPs.[16] The federal government incorporated both VECPs into the Gulf Apparel contract by modification.[17] Only the Propper VECP, however, was incorporated into the Propper contract.[18]

Gulf Apparel appealed, arguing that the term "bleachery seconds" used in its VECP included the "natural or solid" shaded material proposed in the Propper VECP. The Board agreed, stating,

> While we have said that the government is not under any obligation to accept all portions of a VECP, the government does have a duty to evaluate each VECP objectively and [to] give priority to that contractor submitting the idea first over a second contractor submitting the same idea at a later time.
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> ....
>
> In this appeal the government had both VECPs under evaluation during the same time period, it knew what appellant had proposed and it knew what Propper had proposed. The government also knew that appellant's VECP was submitted before Propper's VECP. By not approving that portion of appellant's VECP which proposed the use of ground shade and turning right around and approving Propper's VECP for the use of ground shade, the government has effectively given preference to Propper instead of to appellant who has priority since it was the first to submit the concept in its VECP. The government has constructively accepted appellant's idea (which included the use of ground shade) by approving Propper's proposal for the same idea.[19]

The Board's holding in *Gulf Apparel* clearly centered on the notion that a preference should accrue to the first contractor to submit a VECP. The Board previously had relied on this "preference doctrine" in *NI Industries, Inc.*[20] In *NI Industries* two contractors submitted identical VECPs to the government. The government installation involved had promulgated an unpublished local regulation that governed the disposition of identical submissions. This regulation provided that if two or more contractors submitted essentially identical VECPs, contracting officers were to evaluate only the first VECP received. Any VECPs submitted thereafter were to be "returned without formal evaluation to the submitter."[21] Accordingly, when the contracting officer determined that the NI Industries submittal was second in time, he returned it without evaluation.[22] On appeal, the Board determined that the NI Industries VECP was indeed second in time. It then characterized the installation's return of the VECP without action as a rejection of the VECP.[23] Having found the VECP was rejected, the Board declined to review the rejection decision, stating that it would not question the contracting officer's judgment absent some evidence of abuse of discretion.[24]

The Court of Appeals for the Federal Circuit overturned the Board's decision, albeit on essentially collateral grounds. The court held that the local regulation

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[16] *Id.*

[17] *Id.* at 109,266.

[18] *Id.*

[19] *Id.* at 109,268-69.

[20] ASBCA No. 30,293., 87-1 B.C.A. (CCH) ¶ 19,620 Jan. 30, 1987); *cf.* McLain Int'l, Inc., ASBCA No. 23,132, 80-1 B.C.A. ¶ 14,365, at 70,814 (Mar. 27, 1980) ("A value engineering change proposal, once initiated, confers no proprietary right on the suggestor [sic]. In fact ... several contractors may share an independent but identical proposal under the terms of the same contract or a different one, if all are accepted by the Government"); John J. Kirlin, Inc. v. United States, 827 F.2d 1538, 1541 (Fed. Cir. 1987) ("[T]he first contractor to propose a change based on a particular idea acquires no proprietary rights in the proposal that would allow him priority over a subsequent proposal based on the same idea").

[21] NI Indus., Inc., 87-1 B.C.A. (CCH) ¶ 19,620, at 99,256.

[22] *Id.* at 99,256.

[23] *Id.* at 99,260.

[24] *Id.* The Board attempted to distinguish its holding in this case from its earlier decision in *Covington Industries, Inc. See* ASBCA No. 12,426, 68-2 B.C.A. (CCH) ¶ 7286 (Sept. 27, 1968). In *Covington Industries* the Board had held that a contractor could share in value engineer savings even though the government already had paid these savings to two separate contractors for essentially the same VECP. The Board in *NI Industries* distinguished *Covington Industries* by noting that in the earlier case the government had accepted the VECP, while in *NI Industries* the VECP had been rejected. The Board also noted that in *Covington Industries* each contractor had shared only the savings arising under its own contract. These distinctions, however, ignored the well-established doctrine of constructive acceptance of VECPs. *See, e.g.*, Xerox Corp., ASBCA No. 16,374, 73-1 B.C.A. (CCH) ¶ 9784 (Nov. 21, 1972). The Board in *Covington Industries* more accurately captured the intent behind the VEI clause when it stated,

> As to broader policy considerations, it is understandable that the contracting officer became reluctant to give value engineering allowances for the same proposal to more of the four contractors than seemed necessary. However, such multiple allowances are no more against stated VEI policy than is the provision of later revisions of the clause providing for allowances in relation to estimated future procurement quantities in addition to those called for by the contract under which a VEI proposal is made.

Covington Indus., Inc., 68-2 B.C.A. (CCH) ¶ 7286, at 33,885.

upon which the government had relied in rejecting the NI Industries VECP was an unpublished rule that adversely affected the "substantive rights of individuals."[25] The court noted that, to be binding outside the government, regulations must be subjected to the notice and comment procedures set forth in the Administrative Procedure Act.[26] The installation, however, had adopted the regulation without following the procedures required by the Act.[27] The court, therefore, ruled that because the contracting officer had relied on this regulation in rejecting the NI Industries VECP, his act was illegal and an abuse of discretion.[28] It then remanded the case for further proceedings.[29]

The Federal Circuit did not address directly the issue of the Board's preference doctrine. To guide the disposition of the case on remand, however, the Federal Circuit offered the following dicta:

> What should be done on remand? We believe the evidence is clear that the ... [contracting officer] should have and would have accepted NI's VECP. Government engineers determined the VECPs of the two contractors to be identical. Chamberlain's VECP was ultimately accepted. It was stipulated that, but for the unpublished regulation, the agency would have accepted NI's VECP. We find no case which suggests to us a good reason, or any reason, why the first actual submitter necessarily must receive all the savings accruing from a cost reduction proposal, proffered more or less simultaneously, by more than one contractor. To the contrary, the policy behind the Value Engineering clause would seem to suggest that the savings [should] be shared ... to encourage contractors to propose innovations that reduce the cost of performance of government contracts.[30]

That the Federal Circuit published its *National Industries* opinion *before* the Board decided *Gulf Apparel* clearly evidences the Board's continuing predisposition to afford a preference to the first of several submitters of substantially similar VECPs.[31] Neither the length of time separating the first VECP from subsequent submissions, nor the extent of any government evaluation associated with the initial submittal appears to affect the Board's application of its preference doctrine.

The Board's determination in this regard would be laudable if it were justified. The preference doctrine, however, simply will not withstand reasoned scrutiny. By adopting what amounts to a "first to file" rule, the Board, in essence, has elevated the administrative need to determine with certainty the identity of the proper payee of a savings award over the more compelling need to ensure that savings awards effectively support the goals of the value engineering program. The Department of Defense (DOD) has stated expressly that DOD officials should seek "to promote ... [value engineering] actions that will reduce costs and improve the productivity of DOD in-house and contractor resources."[32] The preference doctrine well may encourage contractors to submit VECPs promptly; however, its inflexibility in tying savings awards solely to the date of submission of the VECP actually may discourage contractors from submitting any VECPs at all. Thus, despite the Board's avowed support for the policy goals that underlie the value engineering program,[33] the Board persistently has advocated a doctrine that effectively thwarts those goals.

On the other hand, the Federal Circuit's analysis more actively supports the DOD's policy objectives. It encourages contractors to submit VECPs, thereby increasing contractor participation in the value engineering program. Even the Federal Circuit's analysis, however, may be unduly restrictive. It requires contracting officers to divide savings awards between submitters of substantially similar VECPs only if these VECPs were submitted "more or less simultaneously."[34] Unfortunately, to determine a VECP's submission date is not always the easiest of tasks. Any rule that imposes a simultaneous submission requirement well might create more disputes than it settles.

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[25] NI Indus., Inc. v. United States, 841 F.2d 1104, 1107 (Fed. Cir. 1988)

[26] *Id.* at 1107 (citing Morton v. Ruiz, 415 U.S. 199 (1974); Alaniz v. Office of Personnel Management, 728 F.2d 1460, 1470 (Fed. Cir. 1984)). *See generally* Administrative Procedure Act § 1(a), 5 U.S.C. § 552(a) (1988).

[27] *NI Indus.*, 841 F.2d at 1107.

[28] *Id.* at 1108.

[29] *Id.*

[30] *Id.*

[31] The Board's decision in *Gulf Apparel* was dated 1 March 1989. The Federal Circuit's decision in *NI Industries* was dated 14 March 1988.

[32] DOD Dir. 4245.8, para. D.

[33] *See, e.g.*, Mishara Constr. Co., ASBCA Nos. 17,957, 18,402, 18,403, 75-1 B.C.A. (CCH) ¶ 11,206 at 53,357 (Apr. 3, 1975) (citing Philco-Ford Corp., ASBCA No. 16,197, 73-1 B.C.A. (CCH) ¶ 9917 (Jan. 30, 1973)); Airmotive Eng'g, ASBCA No. 15,235, 71-2 B.C.A. (CCH) ¶ 8988 (July 13, 1973), *reconsideration*, ASBCA No. 17,139, 74-1 B.C.A. (CCH) ¶ 10517 (Mar. 1, 1974), *second reconsideration*, 74-2 B.C.A. (CCH) ¶ 10696 (June 6, 1974).

[34] *NI Indus., Inc.*, 841 F.2d at 1108.

The recent Board decision in *ICSD Corp.*[35] slightly narrows the distance between the Board and the Federal Circuit on the preference doctrine. *ICSD Corp.* involved a contractor's wide-ranging appeal from a contracting officer's decision to characterize certain savings accruing from a VECP submittal as collateral savings rather than acquisition savings. The contractor, ICSD Corp., objected not only to this characterization of the savings, but also to the contracting officer's decision to divide the savings between ICSD Corp. and a third party contractor, Numax.[36]

Both ICSD Corp. and Numax had submitted VECPs proposing that the military use a small battery pack adapter on night vision scopes for rifles and crew served weapons.[37] The battery pack adapter would function as an external power source, permitting soldiers to power night vision devices with commercially-available AA alkaline batteries, instead of more expensive lithium or mercury batteries that had been manufactured especially for use in the devices.[38]

As originally submitted on 30 October 1979, the ICSD Corp. VECP suggested that the government redesign the night vision devices to accommodate AA batteries.[39] It mentioned the use of an external battery pack adapter only as an aside.[40] On 21 November 1980, Numax submitted its own VECP, which simply proposed that the government use an external battery pack adapter.[41] In late 1980, after extensive evaluation, the government decided to reject the ICSD Corp. VECP.[42] Before government officials could draft a formal rejection, however, ICSD Corp.'s vigorous objections prompted them to revaluate the ICSD Corp. VECP.[43] On 6 January 1981, the government asked ICSD Corp. to submit additional information about its VECP. ICSD Corp. complied, providing more detailed data on 23 January, 30 January, and 5 February 1981.[44]

On 6 March 1981 the government asked both ICSD Corp. and Numax to submit "full up"—that is, very detailed—VECPs describing their respective battery pack adapter concepts.[45] Numax furnished the requested information in a submission that it dated—somewhat cryptically—"March 1981."[46] ICSD Corp. provided information on 6 March, 27 March, and 3 April 1981.[47]

Meanwhile, the government conducted an internal analysis and ultimately decided to accept the battery pack adapter concept.[48] Accordingly, government officials created a framework to compare the merits of the competing VECPs. This framework contained five objective evaluation criteria.[49] The government ultimately found that the two VECPs were equal with respect to one criterion; the Numax VECP was clearly superior in one criterion; and the ICSD Corp. VECP was superior in the remaining three criteria.[50] The government, therefore, awarded ICSD Corp. seventy-five percent of the savings award and gave the remainder to Numax.[51]

On appeal, ICSD Corp. argued that it should have received all of the savings award because it had submitted its VECP first. The Board rejected this argument and upheld the government's decision to split the collateral savings award.[52] Reviewing the flurry of submittals, the Board questioned, without deciding, whether ICSD Corp. actually had been the first to submit a VECP.[53] The Board noted that ICSD Corp. had failed to enclose with its first submissions all the information that the VEI

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[35] ASBCA No. 28,028, 90-3 B.C.A. (CCH) ¶ 23,027 (May 16, 1990), *appeal denied*, 934 F.2d 313 (Fed. Cir. 1991).

[36] *Id.* at 115,626-27, 115,633.

[37] *Id.* at 115,619-20.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 115,620.

[41] *Id.* at 115,621.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 115,621-22.

[45] *Id.* at 115,622.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 115,622-24.

[49] *Id.* at 115,624.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 115,633-34.

[53] *Id.* at 115,633.

clause required a contractor to include in a VECP.[54] Indeed, not until March 1981 did ICSD Corp. provide all this information to the government.[55] The Board also emphasized that the government had found the Numax VECP to be *superior* in one respect to the ICSD Corp. VECP. It stated,

> We do not believe that the prospect of "sharing" an award with a superior proposal down the road will discourage ... efforts [to develop and submit VECPs to the government]. To the contrary, it will likely have the opposite effect—it will encourage the filing of better and more comprehensive proposals. More often than not, the final result will be the same as here—the government ultimately receives a better product at reduced cost to the taxpayers—which is the purpose behind the VEI clause.[56]

By stressing that the Numax VECP was superior, and not merely identical, to the ICSD Corp. VECP the Board purported to reconcile its holding in *ICSD Corp.* with its earlier decision in *Gulf Apparel.* The Board asserted,

> *Gulf Apparel Corporation* ... is factually distinguishable and does not compel a conclusion inconsistent with the one we have reached. In that case, the Board granted relief to an appellant who filed a VECP "first," since the government rejected one aspect of that proposal but soon thereafter approved another contractor's proposal for the identical matter previously rejected. Under these unique circumstances, the Board held that by approving the later proposal, the government had constructively accepted appellant's identical earlier proposal, and the appellant was entitled to all the savings. There was no similar unjustified treatment of appellant's proposal here. Numax's proposal was not identical, but superior to the appellant's in a material respect. Appellant's proposal was judged superior in other respects, and the ratio of savings was developed and shared accordingly.[57]

The dicta in *ICSD Corp.* clearly demonstrates the Board's desire to distance itself from *Gulf Apparel.* By categorizing *Gulf Apparel* as a case involving "unique circumstances" and an instance of "unjustified treatment," the Board effectively minimized the scope and applicability of that holding.[58] Moreover, the Board's frequent, deferential citations to the Federal Circuit's decision in *NI Industries* arguably reveal the Board's intentions to align its future decisions more closely with the true policy goals underlying the value engineering program.

A Proposed Savings Award Sharing Model

Federal officials need not wait for the Board to jettison the preference doctrine on its own initiative. Instead, they should amend the FAR to conform with the analysis advanced by the Federal Circuit in *NI Industries.* Unquestionably, the Board's preference doctrine is counterproductive. It inhibits, rather than encourages, contractors to submit VECPs. To prepare a VECP is often

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[54] *Id.* Contractors must include the following information when they submit VECPs:

> (1) a description of the difference between the existing contract requirement and the proposed requirement, the comparative advantages and disadvantages of each, a justification when an item's function or characteristics are being altered, the effect of the change on the end item's performance, and any pertinent objective test data.
>
> (2) a list and analysis of the contract requirements which must be changed if the VECP is accepted, including any suggested specification revisions.
>
> (3) identification of the unit to which the VECP applies.
>
> (4) a separate detailed cost estimate for (i) the affected portion of the existing contract requirement and (ii) the VECP. Cost reductions associated with the VECP shall take into account the Contractor's allowable development and implementation costs, including any amount attributable to subcontracts ....
>
> (5) a description and estimate of costs the Government may incur in implementing the VECP, such as test and evaluation and operating and support costs.
>
> (6) a prediction of any effects the proposed change would have on collateral costs to the agency.
>
> (7) a statement of the time by which a contract modification accepting the VECP must be issued so as to obtain the maximum cost reduction, noting any effect on the contract completion time or delivery schedule.
>
> (8) identification of any previous submission of the VECP, including the dates submitted, the agencies and contract numbers involved, and previous Government actions, if known.

FAR 52.248-1(c).

[55] ICSD Corp., ASBCA No. 28,028, 90-3 B.C.A. (CCH) ¶ 23,027, at 115,633.

[56] *Id.* at 115,634.

[57] *Id.*

[58] *Id.*

costly.[59] A contractor, however, cannot recover the costs associated with a rejected VECP.[60] Accordingly, if a contractor believes a competitor may exclude it from any share in a resultant savings award simply by filing a substantially similar VECP first, the contractor's incentive to develop a VECP very well could evaporate.

A better rule would encourage the government to evaluate all substantially similar VECPs before it formally accepts a previously submitted VECP. This rule would eliminate the harsh exclusionary effect of the Board's preference doctrine. It also would encourage contractors that might be lagging behind competitors to submit VECPs by reassuring them that their proposals actually would receive fair consideration.

Furthermore, this rule would eliminate the need to determine whether competing VECP submittals were or were not submitted simultaneously. As the tangled chronology of events in *ICSD Corp.* demonstrates, to determine exactly when a flurry of disjointed submittals—many of them technically deficient—actually ripens into a cognizable VECP is often difficult.[61] The government can obviate this problem by focusing not on the date of submittal, but on the objectively verifiable date of the government's written acceptance of a previously submitted VECP. Once the government has accepted a VECP in writing, any contractor that submits a substantially similar VECP should be foreclosed from sharing in the available savings award. If, on the other hand, the government has not accepted a VECP formally, the contracting activity should have to evaluate a subsequently submitted VECP in conjunction with any VECPs that previously have been submitted.

If a contracting activity determines that a VECP is identical in all respects to a previously submitted—but as yet unapproved—VECP, it should not only evaluate the two proposals together, but also should divide the resultant savings award equally between the competing submitters. This rule would not be unfair to the initial submitter, which still would receive some compensation for its proposal. Arguably, the first submitter would retain sufficient incentive to submit more VECPs in the future. Most important, subsequent submitters also would receive compensation and, therefore, also would feel encouraged to submit VECPs in the future.[62]

This outcome is appropriate because the purpose of value engineering is not to provide the earliest submitter with a windfall, but to reduce the cost of acquisitions to the government as much as possible.[63] That goal may be served better if as many contractors as possible actively seek ways to cut costs associated with their contracts.

This approach would not cause the government unduly to delay evaluation of an initial submitter's VECP. By regulation, the government must accept or reject a VECP within forty-five days of receipt.[64] If it cannot reach a decision within this time period, the contracting officer must inform the contractor in writing when the government will issue a decision. Because the government must evaluate an initial proposal expeditiously, the submitter's rivals would have to submit their competing VECPs promptly. If they failed to submit their own proposals before the government accepted the initial VECP, they would forfeit any share in the resulting savings award.

To focus on the date of acceptance rather on than the date of submittal is fair in another respect. If the proposals that the government must consider are highly technical, the government will need a prolonged evaluation period to analyze each proposal fairly.[65] Government officials normally would have no problem integrating another, substantially similar VECP into this ongoing evaluation process. The difficulty of reviewing an additional VECP within the framework of an existing evaluation is minimal compared to the effort of gearing up to conduct an second independent evaluation. Moreover, this integration would not seriously delay the government's decision on VECPs that already were under evaluation. To evaluate a new proposal would require only minimum additional time because the government already would have devised an evaluation framework.[66]

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[59] An appreciation for the costs associated with a VECP submission can be gleaned from substantive content requirements for VECPs set forth in FAR 52.248-1 and FAR 52.248-2.

[60] *See, e.g.*, Derrick Elec. Co., ASBCA No. 21,246, 77-2 B.C.A. (CCH) ¶ 12,643 (June 28, 1977), *appeal dismissed*, 220 Ct. Cl. 673 (1979).

[61] ICSD Corp., ASBCA No. 28,028, 90-3 B.C.A. (CCH) ¶ 23,027, at 115,621-22; *see also* Julian A. McDermott Corp., ASBCA No. 24,622, 82-2 B.C.A. (CCH) ¶ 16,076 (Sept. 24, 1982) (refusing to upgrade contractor's proposal to VECP status because the contractor had failed to document the savings flowing from the proposal).

[62] This principle also would comport with the long line of cases holding that VECPs are payable to the party that took the first positive steps to implement the proposed change, rather than to the party that originated the idea upon which the VECP is based. *See, e.g.*, Xerox Corp., ASBCA No. 16,374, 73-1 B.C.A. (CCH) ¶ 9784 (Nov. 21, 1972); B.F. Goodrich Co., ASBCA No. 10,373, 65-2 B.C.A. (CCH) ¶ 4910 (June 15, 1965). These decisions recognize that VECP awards should accrue to contractors that actively participate in the value engineering program by submitting VECPs to the government.

[63] DOD Dir. 4245.8, para. D.

[64] FAR 48.103(b).

[65] *See, e.g.*, ICSD Corp., ASBCA No. 28,028, 90-3 B.C.A. (CCH) ¶ 23,027, at 115,619-26.

[66] In *Gulf Apparel*, for instance, government technical personnel simultaneously approved two competing VECPs three months after the second contractor submitted its proposal, even though the second contractor had submitted its VECP one month after the first contractor's initial submittal. *See* Gulf Apparel Corp., ASBCA No. 27,784, 89-2 B.C.A. (CCH) ¶ 21,735, at 109,265. This simultaneous approval shows that the government can evaluate two VECPs concurrently with little difficulty.

One particularly constructive aspect of the *ICSD Corp.* decision was the Board's recognition that superior VECPs are entitled to a preference. If, after comparing competing VECPs, a contracting officer finds one VECP to be superior to the others, he or she should allocate the savings sharing solely to the submitter of the superior VECP. The advantages of this approach are intuitively obvious. By awarding all of a savings award to the submitter of a clearly superior VECP, the government will motivate future VECP submitters to submit the best possible VECP in the hopes of capturing entire savings awards for themselves.[67]

Complex or technical VECPs often may be evaluated in component parts. In *ICSD Corp.*, for example, the government compared the two competing VECPs by identifying and contrasting five salient characteristics of the proposals under consideration. As noted above, the government found that ICSD Corp.'s proposal was superior in three respects, that Numax's was superior in one respect, and that the VECPs were otherwise equal.[68] Had it applied the proposed guidelines set forth above, the government properly would have allocated the savings award in *ICSD Corp.* as follows:

> (1) Because the government based its evaluation on five equally weighted criteria, each criterion should be worth twenty percent of the savings award.
>
> (2) Because ICSD Corp.'s proposal was superior with respect to three evaluation criteria, ICSD Corp. should receive all of the savings associated with those areas, or sixty percent of the total award.
>
> (3) Because Numax's proposal was superior with respect to one evaluation criterion, Numax should receive all of the savings associated with that criterion, or twenty percent of the total award.
>
> (4) Because the VECPs were of equal merit in the remaining evaluation criterion, the government should divide the associated savings equally between the two submitters. Accordingly, ICSD Corp. and Numax each would receive ten percent of the total award.

Adding up the awards for each criterion, one finds that ICSD Corp.'s cumulative share of the total award would be seventy percent. Numax's share of the total would be thirty percent. This compares well with the distribution ratio of seventy-five percent and twenty-five percent that the Board actually upheld when it decided the case.

This savings sharing model would meet all the policy goals underpinning the value engineering program. Moreover, it would reward all participating contractors fairly for their efforts. The contracting officer would bear the responsibility of generating suitable evaluation criteria and for weighting them appropriately. Formal evaluation methodology would not be necessary in every case, especially if neither the item procured, nor the VECPs under consideration, were technically complex. Under those circumstances, if a contracting officer wished to dispense with a formal evaluation methodology and to substitute a less formal method of comparison, he or she could do so freely.

Proposed New FAR Language

The federal government should incorporate the initiatives outlined above into the FAR to ensure uniform treatment of multiple VECP submittals by all federal procurement activities. To achieve this goal it could insert the following language, pertaining to FAR 48.104-1, Sharing Acquisition Savings, into a new subclause designated as section (c), Multiple VECP Submittals:

> In the event that two or more substantially similar VECPs are submitted to the contracting officer, the following procedures will be followed. All substantially similar VECPs received by the same contracting activity prior to written acceptance of a previously submitted VECP will be processed in accordance with FAR 48.103. The total amount of the savings award available for allocation among competing VECP submitters shall be determined in accordance with FAR 48.104-1(a) or FAR 48.104-1(b) as appropriate. The contracting officer will determine if the competing VECPs are identical in whole or in part. He or she will also determine whether any of the competing VECPs are superior to the others in whole or in part. If the contracting officer determines that one VECP is superior in all respects to all competing VECPs, the total available savings award shall be paid to the submitter of that VECP. If all VECPs under evaluation are identical in all respects, the total available savings award will be distributed equally among all VECP submitters. If the contracting officer determines that one of the competing VECPs is superior to the others in part he or she will quantify that superiority as a percentage of the total available savings award. That percentage will be paid to the submitter of the partially superior VECP. The remaining percentage of the total available savings award will be distributed equally among the competing VECP submitters.

The government could incorporate similar language into FAR 48.104-2 to address collateral savings awards.

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[67] ICSD Corp., ASBCA No. 28,028, 90-3 B.C.A. (CCH) ¶ 23,027, at 115,634.

[68] *Id.* at 115,624.

This proposed language anticipates that a contracting officer occasionally may have to evaluate more than two substantially similar VECPs simultaneously. For instance, if three contractors submitted competing VECPs and the contracting officer elected to devise evaluation criteria to compare them, three possibilities would exist for each evaluation criteria employed:

(1) The contracting officer could find all three VECPs to be identical with respect to a particular evaluation criterion. In this case each submitter would share equally in the portion of the savings award that is associated with that criterion.

(2) The contracting officer could conclude that two of the competing VECPs are identical with respect to a particular evaluation criterion and the third *inferior*. In this case, the two submitters of the identical VECPs would receive half of the portion of the savings award associated with that criterion. The contractor that submitted the inferior VECP would not share in that portion of the award.

(3) The contracting officer could find one VECP to be *superior* to the other two with respect to a particular evaluation criterion. In this case, the submitter of the superior VECP would receive all of the portion of the savings award associated with that criterion. These basic rules of application would resolve allocation problems no matter how many VECPs the contracting officer might have to consider.

Conclusion

The government should adopt this proposed amendment to the FAR as soon as practicable. By eliminating the preference doctrine it would resolve the current philosophical differences between the Board and the Federal Circuit on the sharing of savings awards and thereby would effect the stated policy goals of the value engineering program. More importantly, it would provide urgently needed guidance to contracting officers charged with the responsibility of expeditiously processing VECPs.

A Tennessee Snail Darter at Grafenwoehr? The Application of the Endangered Species Act to Military Actions Abroad

Major David D. Joy, Jr., USAR

Introduction

The past few years have seen a major shift of focus in the environmental efforts of Congress, federal executive agencies, and environmental nongovernmental organizations (NGOs). Momentum to pass further laws protecting the domestic environment is waning; the current objectives of interest are the development of international coverage for existing United States environmental statutes, and the creation of a new international legal regime to resolve international environmental problems. This change in focus evolved as climatic change, species destruction, oil spills, and the loss of rain forests became major concerns of the American and European publics.

A parallel growth of interest in the application of domestic and international law to international environmental problems has arisen among lawyers and legislators.[1] Military attorneys whose missions require them to address environmental issues should prepare to broaden their horizons. They soon may have to confront not only increased domestic pressure to apply federal laws and standards to United States military activities abroad, but also strong pressure from host-nation officials and citizens who wish to apply their own stringent environmental standards to American military activities in their countries.[2]

The *Defenders of Wildlife* litigation[3] concerning the extraterritorial application of the Endangered Species Act (ESA)[4] reflects this jurisprudential ferment. If the Supreme Court refuses to reverse the Eighth Circuit's latest decision in this dispute,[5] military attorneys will face the task of conforming current and planned military actions abroad to the requirements of the ESA.

This article will discuss the procedures that agencies currently must follow under the ESA. It then will sum-

[1] Several recent publications have analyzed the burgeoning public interest in international environmental issues and the role of lawyers. *See, e.g.*, Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 Am. J. of Int'l L. 1 (1990); Charles E. DiLeva, *Trends in International Environmental Law: A Field With Increasing Influence*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,076 (Feb. 1991). In early 1991, the Department of Justice was handling 40 international environmental law matters involving 20 countries. DiLeva, *supra* at 10,077 n.9.

[2] One limited example is a recent Japanese law protecting endangered species under the control of the Japanese Government. *See* Hiroji Isozaki, *Japan's New Law on Endangered Species*, 7 B.U. Int'l L.J. 211, 211-21 (1989).

[3] Defenders of Wildlife v. Hodel, 658 F. Supp. 43 (D. Minn. 1987), *rev'd and remanded*, 851 F.2d 1035 (8th Cir. 1988), *on remand*, 707 F. Supp. 1082 (D. Minn. 1989), *aff'd sub. nom.* Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990), *cert. granted*, 111 S. Ct. 2008 (1991).

[4] 16 U.S.C. §§ 1531-1543 (1988).

[5] Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990) [*Defenders of Wildlife IV*].

marize the issues raised in the recent litigation, and finally, it will offer recommendations to help Army planners to apply the ESA to actions abroad.

Federal Agency Actions Under the Endangered Species Act

Congress has attempted since 1966 to protect endangered or threatened species.[6] From the outset, Congress focused on directing federal agency action to further this goal. Congress declared in the 1966 law that

> *the Secretary of Defense* ... shall seek to protect species of native fish and wildlife, including migratory birds that are threatened with extinction, and, *insofar as is practicable and consistent with the primary purposes of such bureau[]* ... shall preserve the habitats of such threatened species [in] all lands under [his or her] jurisdiction.[7]

In 1973, Congress repealed the earlier laws, only to impose an even heavier burden on federal agencies. In the Endangered Species Act, Congress retained the concept of agency responsibility, but removed the "practicable and consistent" loophole. The new act flatly required "all Federal departments and agencies ... to conserve endangered species and threatened species and ... to utilize their authorities in furtherance of the purposes of [the ESA]."[8]

The ESA assigns to the Secretary of the Interior the lead role in the protection of endangered and threatened species.[9] The Secretary routinely administers the ESA through the Fish and Wildlife Service (FWS).[10] Acting through the FWS, the Secretary must determine whether any species is endangered or threatened, must publish a list of endangered and threatened species, and must "designate[] any habitat of such species which is then considered to be critical" to the survival of the species.[11] In making these determinations, the Secretary, or his or her representative, may rely on advice from foreign governmental conservation agencies.[12] The Secretary's principal role as guardian of the congressional policy, however, lies in enforcing federal agency consultation procedures.

Section 7 of the ESA requires all federal agencies to engage in a complex series of consultations with the Secretary of the Interior and, in certain cases, with the Endangered Species Committee,[13] before commencing actions that pose a significant risk to the well-being of any threatened or endangered species.[14] The Act provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical, unless such agency has been granted an exemption by the [Endangered Species] Committee .... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.[15]

The federal courts have construed this provision very strictly. They have interpreted the ESA to *mandate* federal actions to protect listed species and to conserve and preserve ecosystems upon which endangered species depend.[16] Other environmental statutes, such as the National Environmental Policy Act (NEPA),[17] require

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[6]Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926, *amended by* Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275, *repealed by* Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 903 (1973).

[7]80 Stat. 926 (1966) (emphasis added).

[8]16 U.S.C. § 1531(c)(1) (1988).

[9]*Id.* § 1532 (15). This article will not discuss the interrelationship between the ESA and the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (1988), under which the Commerce Department assumes the lead role when potential agency actions affect endangered or threatened marine mammals. Nor will this article discuss the second major goal of the ESA—that is, to prevent the importation or interstate transportation of endangered or threatened species. *See* 16 U.S.C. § 1538 (1988).

[10]*See* 50 C.F.R § 402.01(b) (1990).

[11]16 U.S.C. § 1533(a) (1988).

[12]*Id.* § 1533(b).

[13]The Endangered Species Committee is a council established pursuant to section 7(e) of the Endangered Species Act. 16 U.S.C. § 1536(e) (1988). It is composed of six permanent members—the Secretary of Agriculture, the Secretary of the Army, the Secretary of the Interior, the Chairman of the Council of Economic Advisors, the Administrator of the Environmental Protection Agency, and the Administrator of the National Oceanic and Atmospheric Administration—along with one individual whom the President appoints to represent the state in which a proposed agency action is to occur. *Id.*

[14]*Id.* § 1536.

[15]*Id.* § 1536(a)(2).

[16]Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257, 262 (9th Cir. 1984) (holding that the purpose of section 7 is "to ensure that the federal government does not take actions, such as building a dam or highway, that incidentally jeopardize the existence of endangered or threatened species"); Palila v. Hawaii Dep't of Land and Natural Resources, 649 F. Supp. 1070 (D. Haw. 1986) (holding that the ESA does not permit an agency to adopt a balancing of species or a mixed use of a critical habitat approach when considering an action that threatens an endangered species); *see also* Romero-Barcelo v. Brown, 643 F.2d 835, 856 (1st Cir. 1981) (ruling that the Navy violated section 7 by carrying out training exercises on an island off Puerto Rico).

[17]National Environmental Protection Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended, 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1988)).

only that the federal government follow various procedural steps, such as considering and balancing environmental costs.[18] The ESA goes much further. The burdens it imposes on federal agencies are substantive as well as procedural.

In the landmark decision of *Tennessee Valley Authority v. Hill*[19] the Supreme Court ruled that the text and legislative history of the ESA reveal a conscious decision by Congress to favor the protection of endangered species over the primary actions of federal agencies. Describing the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,"[20] the Court concluded that the manifest purpose of the Act is "to halt and reverse the trend towards species extinction, *whatever* the cost."[21]

To determine how one should carry out the ESA's broad mandate, one must comprehend exactly which federal actions the ESA governs. To place a limit on the act's scope can be difficult because the ESA can be applied much more broadly than most other federal conservation statutes. For instance, only a "major federal action" that has a "significant impact" on the environment will trigger NEPA's requirement for preparing an Environmental Impact Statement (EIS).[22] In contrast, the ESA encompasses "any action authorized, funded, or carried out by ... [a federal] agency."[23] Discussing the ESA, the Supreme Court suggested in dictum that the Act extends to "all actions that an agency can ever take."[24] Federal regulations that implement the ESA similarly define "action" to include "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies."[25] They specifically enumerate as examples of actions that will trigger ESA consultation requirements the promulgation of regulations, grants-in-aid, or—more vaguely—any "actions [that] directly or indirectly caus[e] modifications to the land, water, or air."[26]

The Consultation Procedure

Section 7 joins to this universal coverage of possible federal actions a very complex procedure for agency consultation. The following is a brief summary of the steps involved.

The Consultation Phase

A federal agency first must review its own proposed action to determine how it will affect wildlife.[27] The agency may consult informally with the FWS to see if its proposed action is "likely to adversely affect listed species or critical habitat," and also may engage in "early consultation" procedures if agency officials perceive that an applicant for a license may be involved.[28] If the agency determines that the proposed action likely will harm a threatened or endangered species or a critical environment, the agency then must commence "formal consultation" by submitting a written request to the Director of FWS (the Director).[29] This request must include the best scientific and commercial data available on the relevant listed species or critical habitat.[30] The Director normally will deliver a "biological opinion" within ninety days of the submission of this request.[31] In the meantime, the agency must "make ... [no] irreversible or irretrievable commitment of resources with respect to [the] agency action" that could affect reasonable alternatives to be considered or proposed by the Secretary.[32]

The Biological Opinion

In the biological opinion, the Director must discuss in detail the effects of the proposed action on the critical habitat and on listed species.[33] Most importantly, he or

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[18] 42 U.S.C. § 4332 (1988).

[19] 437 U.S. 153 (1978).

[20] *Id.* at 180.

[21] *Id.* at 184-85 (upholding injunction forbidding construction of a dam that threatened the endangered Tennessee snail darter with extinction) (emphasis added); *see also* H. Rep. No. 412, 93d Cong., 1st Sess. (1973).

[22] 42 U.S.C. § 4332(2)(C) (1988).

[23] 16 U.S.C. § 1536(a)(2) (1988).

[24] *Hill*, 437 U.S. at 173 n. 18; *see also* North Slope Borough v. Andrus, 486 F. Supp. 332, 351 (D.D.C. 1980) (issuing injunction against further North Slope development until Secretary of Interior could insure that development activities would not violate ESA), *aff'd in part, rev'd in part on other grounds*, 642 F.2d 589 (D.C. Cir. 1980).

[25] 50 C.F.R. § 402.02 (1990). Federal regulations define as an action area not only the immediate situs of a federal action, but also any other areas that are affected directly or indirectly by the action. *See id.*

[26] *Id.*

[27] *Id.* §§ 402.11, 402.13. This article will not discuss the biological assessment phase that federal regulations require for major federal *construction* actions that could affect listed species or threatened habitat. *See id.* § 402.12. These assessments normally take 180 days to complete and may be undertaken as part of the NEPA compliance process. *Id.* §§ 402.06, 402.12(i).

[28] *Id.* §§ 402.11, 402.13.

[29] *Id.* § 402.14; 16 U.S.C. § 1536(b) (1988).

[30] 50 C.F.R. § 402.14(d).

[31] *Id.* § 402.14(e). The Secretary and the federal agency generally may agree to a longer period; however, if a permit or license applicant also is involved, the governmental parties may not extend the consultation period without the applicant's consent. 16 U.S.C. § 1536(b)(1)(B) (1988).

[32] 16 U.S.C. § 1536(d).

[33] *Id.* § 1536(b); 50 C.F.R. § 402.14(h) (1990).

she must determine whether the action will jeopardize the continued existence of a species or will modify adversely a critical habitat.[34] If he or she finds that the action will promote either effect, the Director must issue a "jeopardy biological opinion." This opinion will offer "reasonable and prudent alternatives"—if any exist—to minimize the action's impact on listed species and critical habitat.[35] These alternatives must reduce the extent of "incidental take"—a term of art used to define an action, taken by an agency, that results in the harassment, killing, or capture of listed species.[36]

If the Director concludes that the action and its resultant incidental take will not violate section 7, he or she will issue a "no jeopardy biological opinion." This opinion, however, still may set forth terms and conditions limiting the agency's action, and may require the agency to file reports with the FWS as it executes its plans.[37]

The Appeal Stage

If, after the Director issues a jeopardy opinion, the affected agency decides that it cannot carry out the alternatives offered by the FWS, it may seek an exemption or an exception.[38] An agency must file its application for an exemption with the Secretary of the Interior within ninety days after the completion of the formal consultation process.[39] The Secretary has twenty days to review the application and to consider threshold issues, such as whether the agency has attempted in good faith to modify its proposed action or to consider reasonable and prudent alternatives.[40]

If the Secretary finds that the agency has met these threshold standards, he or she must hold an adjudicatory hearing, as contemplated by the Administrative Procedure Act, to consider the merits of the agency's application for exemption. In the course of this hearing the Secretary must prepare a record of the proceedings and a report for the Endangered Species Committee.[41] Within 140 days after making the threshold determination, the Secretary shall submit the record and report to the Committee.[42]

After receiving the record and the Secretary of Interior's report, the Committee has thirty days to make its final determination.[43] It may grant an exemption if five or more of its seven members find that:

(1) "no reasonable and prudent alternatives to the proposed agency action [exist]";

(2) "the benefits of ... [the proposed] action clearly outweigh the benefits of alternative courses of action [that are] consistent with conserving the species or its critical habitat, and [the agency] ... action is in the public interest";

(3) "the action is of regional or national significance"; and,

(4) "neither the Federal agency concerned nor the exemption applicant [have] made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of [16 U.S.C. § 1536]."[44]

If it determines that all four factors have been satisfied, the Committee may exempt the agency from the requirements of the act. Before it grants this exemption, however, the Committee must establish "such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned."[45]

Judicial Review

Neither the statute, nor the federal regulations, reveal what actions an agency may take when the Secretary makes a threshold decision not to allow an appeal to the Endangered Species Committee or when the Committee refuses to grant an exemption. Both decisions, however, are "final agency actions" for the purpose of appeal.[46]

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[34] *See* 50 C.F.R. § 402.14(h)(3) (1990).

[35] *Id.* The definition of "reasonable and prudent alternatives" appears at 50 C.F.R. § 402.02. The regulation also contains a curious provision, which has no source in the ESA, that neither these reasonable and prudent alternatives, nor the FWS's terms and conditions, may "alter the basic design, location, scope, duration, or timing of the action ... [or] may involve ... [more than] minor changes." *Id.* at 402.14(i) (2). This regulatory exception, however, runs counter to the Supreme Court's interpretation of the ESA in *Hill. See generally supra* notes 19-21 and accompanying text.

[36] 50 C.F.R. § 402.02 (1990).

[37] 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

[38] 16 U.S.C. § 1536(e), (g); 50 C.F.R. § 402.15.

[39] 16 U.S.C. § 1536.

[40] *Id.* § 1536(g)(3); 50 C.F.R. § 451.02.

[41] 16 U.S.C. § 1536(g)(4).

[42] *Id.* § 1536(g)(5).

[43] *Id.* § 1536(h)(1).

[44] *Id.*

[45] *Id.*

[46] *Id.* § 1536(g)(3), (n).

Accordingly, if an agency attempts to execute its proposed action despite a negative threshold determination or adverse Committee finding, it will subject itself to court challenges.

A person or organization may seek judicial review of a Committee decision in federal court within ninety days after the decision is rendered.[47] Jurisdiction vests in the circuit court in whose area the federal action will be carried out. When the action in question will take place outside any circuit, the Circuit Court of Appeals for the District of Columbia shall have jurisdiction.[48] In light of the precedent established by the Supreme Court's decision in *Hill*, an agency's chances of successfully challenging a decision by the Secretary or by the Committee appear to be slim.[49]

The Statutory Exception

Military attorneys who believe that a proposed action may incur the opposition of the Secretary or the Committee should consider an important statutory exception to ESA requirements. This exception requires the Committee to exempt an agency action if the Secretary of Defense issues a written finding that exemption is "necessary for reasons of national security."[50] Significantly, this exception does not enable an agency to evade every stage of the ESA consultation process. The agency still must comply with all the procedural requirements leading up to the Committee meeting.

Application of the ESA Abroad

In light of these procedural hurdles, a military lawyer contemplating military action in Europe, Japan, or South Korea well might hope that no listed species or critical habitats exist in those areas. Unfortunately, of the 370 species of wildlife that the United States Fish and Wildlife Service has designated as "Endangered," "Threatened," or "similar in appearance to Endangered or Threatened species,"[51] at least half have primary ranges outside the United States.[52] The FWS specifically has identified twelve endangered or threatened species in Europe,[53] fifteen endangered species in Japan,[54] and five endangered species in Korea.[55] An action that affects any of these species could trigger ESA consultation requirements.

The Litigation

The reluctance of the executive branch to apply ESA consultation procedures to federal actions overseas has led to four years of litigation. The saga of *Defenders of Wildlife v. Hodel* began in the Minnesota federal district court in 1986.[56] In that year, the Secretary of the Interior rescinded a regulation, which had existed since 1978, that had required agencies to consult with the Secretary of the Interior before initiating actions that might affect listed species in foreign countries.[57] The Defenders of Wildlife, the Friends of Animals and Their Environment, and the Humane Society of the United States challenged this

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[47] *Id.* § 1536(n). Section 7 establishes no time limit for judicial review of a negative threshold determination.

[48] *Id.*

[49] *See generally Hill*, 437 U.S. 174 (1978).

[50] 16 U.S.C. § 1536(j).

[51] 50 C.F.R. § 17.11 (1989). The ESA defines an endangered species as "any species which is in danger of extinction throughout all or a significant portion of its range" while a threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(6), (20) (1988).

The Fish and Wildlife Service also lists endangered and threatened plant life and critical habitats for wildlife and plants. *See* 50 C.F.R. §§ 17.12, 17.95 to .96 (1989). Neither the listings in the Code of Federal Regulations, nor the Federal Register supplements through the end of 1990, however, list any endangered or threatened plant life or critical vegetation habitats in Europe, Japan, or Korea.

[52] *See Defenders of Wildlife II*, 851 F.2d at 1037.

[53] 50 C.F.R. § 17.11 (1989). The FWS lists as endangered all of the following European species: the brown bear in Italy, the Appennine chamois in Italy, the Corsican red deer in Corsica and Sardinia, the Spanish lynx in Spain and Portugal, the Mediterranean monk seal, the Spanish imperial eagle, the Eurasian peregrine falcon, the peregrine falcon, the Hierro giant lizard in the Canary Islands, the Ala Balik trout in Turkey, and the cicek (minnow) in Turkey. *Id.* The FWS also lists the Ibiza wall lizard in the Balearic Islands as a threatened species. *Id.*

[54] 50 C.F.R. § 17.11 (1989). All of the following are endangered species: the iriomate cat in the Ryukyu Islands, the Ryukyu sika deer in the Ryukyu islands, the dugong, the Japanese macaque, the Ryukyu rabbit, the hooded crane, the Japanese crane, the peregrine falcon, the Nordmann's greenshank, the Japanese crested ibis, the oriental white stork, the Japanese giant salamander, the ayumadoki (loach fish), the nekogigi catfish, and the Miyaka tango (Tokyo bitterling).

[55] 50 C.F.R. § 17.11 (1989). The endangered species in Korea are the dhole (Asiatic wild dog), the Japanese crane, the Chinese egret, the Japanese crested ibis, and the Tristam's woodpecker.

[56] Defenders of Wildlife v. Hodel, 658 F. Supp. 43 (D. Minn. 1987) [*Defenders of Wildlife I*], *rev'd and remanded*, 851 F.2d 1035 (8th Cir. 1988) [*Defenders of Wildlife II*], *on remand*, 707 F. Supp. 1082 (D. Minn. 1989) [*Defenders of Wildlife III*], *affirmed sub. nom.* Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990) [*Defenders of Wildlife IV*], *cert. granted*, 111 S. Ct. 2008 (1991).

At least two law review articles discuss this litigation. *See* John C. Beiers, *The International Applicability of Section 7 of the Endangered Species Act of 1973*, 29 Santa Clara L. Rev. 171 (1989); Note, *The Extraterritorial Application of Section 7 of the Endangered Species Act*, 13 Colum. J. of Envtl. L. 129 (1987).

[57] 50 C.F.R. § 402.02 (1986) (amending 50 C.F.R. § 17.91 (1977)); *see also* 43 Fed. Reg. 870, 874 (1978). No record suggests that the military services ever actually consulted with the Secretary of the Interior from 1978 to 1986.

modification, seeking a declaratory judgment that the new regulation was illegal. They argued that the ESA imposed a statutory duty on the Secretary of the Interior to protect endangered or threatened species in foreign countries.[58]

To date, this litigation has resulted in four published court decisions. Each addressed either one or both of the following issues: (a) the procedural issue of whether the plaintiffs had standing and (b) the substantive issue of whether Congress intended that the ESA have an extraterritorial effect.

The standing issue, which arises frequently in environmental litigation, derives from constitutional language limiting the judicial power of federal courts to the resolution of "cases" and "controversies."[59] To demonstrate that it properly may invoke the adjudicatory process, a party "must ... allege[] such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues."[60] This standard demands that a plaintiff "show that he [or she] personally has suffered some actual or threatened injury as a result of the punitively illegal conduct of the defendant, and that the injury can be fairly traced to challenged action and is likely to be redressed by a favorable decision."[61]

In *Defenders of Wildlife I*[62] the Federal District Court for the District of Minnesota granted the Government's motion to dismiss for lack of standing. The plaintiffs had predicated their interests in the proper enforcement of the ESA on the assertion that members of their organizations regularly benefited from observing endangered species outside the United States. They contended that the government's refusal to ensure section 7 consultations had injured these interests. The district court, however, found this injury "insufficient," and held that the plaintiffs had failed to demonstrate the requisite level of "actual" or "threatened" injury.[63] The court further noted that the plaintiffs had not identified any specific federal action, taken without section 7 consultation, that clearly had harmed an endangered species in a foreign country.[64]

In *Defenders of Wildlife II*[65] the Eighth Circuit reversed the district court's decision and remanded the case.[66] The circuit court ruled that the change to the regulations actually had injured the plaintiffs by reducing regulatory coverage of agency actions.[67] The court remarked that the plaintiffs actually did allege that specific projects in countries visited by plaintiffs' members would "increase the rate of extinction of endangered species." It noted that Defenders of Wildlife had contended that two Agency for International Development (AID) projects had affected endangered species directly and that AID had initiated these projects without consulting with the Department of the Interior.[68] The court concluded that this injury was sufficient to confer standing, commenting that, under the doctrine adopted by the Supreme Court in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, "an interest in aesthetic, conservational, and recreational values will support standing when an organizational plaintiff alleges that its members use the area and will be adversely affected."[69]

In "*Defenders of Wildlife III*"[70] and "*Defenders of Wildlife IV*,"[71] the Government vainly sought to resuscitate the standing issue.[72] Its failure, and the Eighth Circuit's adoption of a very liberal test for standing in claims of injury from federal actions abroad—bodes ill for the future. In future ESA litigation, an NGO probably will meet any standing challenge if it can show that a military action abroad will affect a specific area that contains listed wildlife and that is visited regularly by members of the NGO.

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[58] *Defenders of Wildlife II*, 851 F.2d at 1038.

[59] U.S. Const., art. III, § 2.

[60] Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 72 (1978) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)); *Defenders of Wildlife II*, 851 F.2d at 1038.

[61] Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (quoting Gladstone Realtors v. Valley of Bellwood, 441 U.S. 91, 99 (1979); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)); *Defenders of Wildlife II*, 851 F.2d at 1038-39; *see also* Allen v. Wright, 468 U.S. 737, 752 (1984).

[62] *Defenders of Wildlife I*, 658 F. Supp. at 43.

[63] *Id.* at 46.

[64] *Id.*

[65] *Defenders of Wildlife II*, 851 F.2d at 1035.

[66] *Defenders of Wildlife II*, 851 F.2d at 1037.

[67] *Id.* at 1039.

[68] *Id.* at 1040-42.

[69] *Id.* at 1040 (citing United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 702 (1973)).

In finding that the plaintiffs demonstrated adequate injury, the Eighth Circuit also relied on an alternative legal doctrine known as "procedural injury." *Id.* at 1040. This doctrine, which other circuits previously had adopted, posits that the decision of an agency not to abide by "statutorily-mandated" procedures itself constitutes sufficient injury to support standing. *See generally* Trustees for Alaska v. Hodel, 806 F.2d 1378, 1380 (9th Cir. 1986); Munoz-Mendoza v. Pierce, 711 F.2d 421, 428 (1st Cir. 1983).

[70] *Defenders of Wildlife III*, 707 F. Supp. at 1082.

[71] *Defenders of Wildlife IV*, 911 F.2d at 117.

[72] *Defenders of Wildlife III*, 707 F. Supp. at 1084; *Defenders of Wildlife IV*, 911 F.2d at 119.

Extraterritorial Application

In *Defenders of Wildlife III*, arguing once again before the Minnesota district court, the Government asserted that Congress had not intended to apply the ESA to federal actions abroad.[73] To support its contentions, the Government cited passages from the ESA and from congressional and agency interpretations of the Act. It also alluded to the long-standing judicial presumption against extraterritorial application of federal laws.[74] The district court acknowledged the strength of these arguments.[75] It found, however, that the statutory language of the ESA "plainly states that ... federal agencies ... [must] consult with the Secretary regarding projects in foreign countries."[76] Noting that the consultation requirement applies to *any* federal action that might harm a threatened or endangered species and that many endangered species exist outside of the United States, the court reasoned that the Act had to apply to federal actions abroad.[77]

In *Defenders of Wildlife IV* the Eighth Circuit upheld the ESA's extraterritorial application, finding that it was justified not only by the plain language of the ESA, but also by Congress's evident intent to promote conservation efforts worldwide.[78] The Eighth Circuit dismissed the Government's argument that an extraterritorial application of the Act would harm American international relations.[79] The Government had claimed that to apply the consultation process to federal activities overseas would impinge upon the rights of foreign nations "to strike their own balance between development of natural resources and protection of endangered species."[80] The court responded, "We note initially that the Act is directed at the actions of federal agencies, and not at the actions of sovereign nations. Congress may decide that its concern for foreign relations outweighs its concern for foreign wildlife; we, however, will not make such a decision on its behalf."[81] This strong language sets the stage for the dilemma currently facing military policymakers.

Observations

If the Supreme Court upholds the Eighth Circuit's decision in *Defenders of Wildlife IV*, the Secretary of the Interior will have to draft final regulations to govern actions abroad within sixty days after the entry of final judgment.[82] The Army and other federal agencies then will have to decide what these regulations will contain. Simply to invoke the national security exception as a talisman against any application of section 7 to military actions abroad would be an extreme—and largely ineffective—alternative. Because an agency may claim this exception only in the final stages of the ESA consultation process, the military still would have to contend with most of section 7's procedural headaches.

If one must expand the definition of "action" to apply it extraterritorially, one also might consider restricting the definition by removing from it the broadly worded phrase "actions causing modifications to the land, water, and air." This change, however, would run afoul of the sweeping interpretation of "actions" that appears in both the language of the Act and in the opinions of the Supreme Court. Indeed, any attempt to modify the regulations may prove difficult because the existing regulations track the ESA's statutory language quite closely. Nevertheless, when federal agencies advise the Secretary in the revision of the regulations, they should attempt to address the problems created by applying the ESA extraterritorially. For the military, these problems include the following:

(1) a lack of American expertise in the range, problems, and habitats of listed species abroad;

(2) the expenses of transporting experts from the United States to foreign nations to conduct in-depth studies abroad;

(3) the absence of any provision in the ESA or in pertinent regulations allowing foreign input into biological opinions, threshold determinations, or Committee decisions; and

(4) the potential clash of interests between foreign governments and the United States.[83]

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[73] *Defenders of Wildlife III*, 707 F. Supp. at 1084.

[74] *Id.*

[75] *Id.* (citing United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977)).

[76] *Id.* at 1084.

[77] *Id.* at 1084-85.

[78] *Defenders of Wildlife IV*, 911 F.2d at 122-23.

[79] *Id.* at 124-25.

[80] *Id.* at 125.

[81] *Id.*

[82] The *Defenders of Wildlife III* court order imposed especially severe time constraints on the Government. The district court ordered the Secretary of the Interior to publish temporary regulations within 30 days, and final regulations within 60 days, of the entry of final judgment. *See Defenders of Wildlife III*, 707 F. Supp. at 1086.

[83] The following hypothetical may help to illustrate this point. Suppose the Japanese Government decides to hold its annual joint winter training exercise in the traditional nesting grounds of the Japanese crane. If the Japanese Government already has decided that sufficient safeguards exist to protect the crane, should the United States second-guess this finding?

Agency attorneys could seek to persuade Congress to amend the ESA. They could ask Congress to draft a provision that reflects the problems of applying a "full-fledged" ESA consultation process abroad. Going to Congress, however, might open up a "Pandora's box." Ultimately, it could lead to even less regulatory flexibility.

Military attorneys more profitably might advance a procedural scheme that combines an early consultation procedure—similar to the procedure currently used for license applicants[84]—with a national security exception. This scheme would work as follows:

(1) The military would contact host-nation governments as soon as possible to secure the help of local experts in compiling a "universal" survey of the location, habitat, and state of listed species.

(2) The military would offer to advise the host government and local experts about the interaction under the ESA between proposed military activities and the protection of listed species.

(3) The military and host-nation experts would determine what mitigation procedures and alternatives should be followed in any future military actions.

(4) The military would submit a broad range of proposed activities, along with the results of the first three steps, to the Secretary of the Interior for a universal, preliminary biological opinion.

(5) Whenever the military and local experts arrive at a definite plan for a proposed action, the military would seek a formal biological opinion. The Director of Fish and Wildlife should complete this opinion in less time than he or she normally would take to prepare opinions for actions to be performed within the United States.

(6) If the Director issues a jeopardy biological opinion and the military, for whatever reason, cannot follow an alternative course of action, it should raise the national security exception if it considers American participation in the exercise to be vital.

This umbrella process may be the military's best response to an extraterritorial expansion of the ESA. It not only features an abbreviated waiting period, but also provides a role for the FWS and foreign governments, but also should meet all statutory ESA consultation requirements. Moreover, because it is a good-faith effort to apply the statute, the courts should grant considerable deference to the agency interpretation.[85]

[84] *See* 50 C.F.R. § 402.11 (1990).

[85] *See, e.g.*, Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

Was That a Personal Order or a Standing Order?

In the recent case of *United States v. Gussen*[1] the Army Court of Military Review clarified the difference between failure to obey a standing order and disobedience of a personal order of a commissioned officer.

At trial, Gussen pleaded guilty to several offenses—among them, willfully disobeying the lawful order of a commissioned officer in violation of Uniform Code of Military Justice (UCMJ) article 90.[2] The disobedience charge derived from Gussen's consumption of alcohol while deployed with his unit in Panama on Operation Just Cause, in defiance of a directive that his brigade commander had issued immediately before deployment.

A general court-martial sentenced Gussen to a dishonorable discharge, confinement for twenty-four months, forfeiture of all pay and allowances, and reduction to private (E-1). He appealed. Appellate defense counsel argued, *inter alia*, that Gussen's guilty plea to the charged violation of article 90 was improvident because the providence inquiry had failed to elicit that the brigade commander had directed the order personally to the accused. The court agreed, although it also held that

[1] 33 M.J. 736 (A.C.M.R. 1991).

[2] Uniform Code of Military Justice art. 90, 10 U.S.C. § 890 (1988) [hereinafter UCMJ].

available evidence provided a sufficient factual basis to support the accused's plea to disobedience of orders in violation of UCMJ article 92(2).[3]

The Government's desire to maximize an accused's punishment often leads trial counsel to mischarge UCMJ article 92[4] violations as violations of UCMJ article 90.[5] The discussion to article 90 expresses the key distinction between the two articles, providing that to serve as a basis for an article 90 violation, "[t]he order [that the subordinate has disobeyed] must [have been] ... directed specifically to the subordinate. Violations of regulations, standing orders or directives, or failure to perform previously established duties are not punishable under this article, but may violate Article 92."[6]

In *United States v. Keith*[7] the United States Court of Military Appeals considered whether a convening authority had been an accuser and, thus, had been disqualified from referring the case to a court-martial that he had appointed.[8] In deciding that the convening authority had not been disqualified, the court thoroughly analyzed the difference between a personal order and a general order. It stated that

> [w]hen the two offenses [under articles 90 and 92] are compared in the light of the Code and the Manual [for Courts-Martial], it is readily apparent that the difference between them finds its roots in the personalized nature of the transaction .... If ... [the convening authority] ... charg[es] a subordinate with a personal affront to his [or her] dignity, then he [or she] colors the proceedings with a personal touch .... Without a personal flavor added to the order, the maximum punishment could not justifiably jump from six months to five years .... Unless the order is so framed as to get out of the routine category, the charge should be laid under Article 92.[9]

Another way to analyze these cases is to ask: "What is the ultimate offense?" That "an order to obey the law can have no validity beyond the limit of the ultimate offense committed" long has been an established principle of military law.[10] In *United States v. Loos*,[11] for instance, the accused's company commander had ordered him to report to the charge of quarters, to sign in and out, and to cut the grass. After Loos failed to carry out these duties, he was charged and convicted under UCMJ article 90 for failing to obey the order of his commander. Reversing the conviction, the United States Court of Military Appeals stated:

> To our minds, the evidence as reflected in the record of trial here fails to disclose that the accused was given a direct, personal order which he knowingly failed to obey. It is undeniable that a superior officer may, by supporting a routine duty with the full authority of his office, lift it above the common ruck .... Here, however, we find no evidence that [the accused's commander] sought to do this.[12]

To determine the "ultimate offense" involved, one also must consider the circumstances under which the superior issued the order. On occasion, a superior improperly will direct an order to a specific subordinate solely to escalate that individual's eventual punishment.[13] The Court of Military Appeals considered this issue in

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[3] *Gussen*, 33 M.J. at 737.

[4] The elements of failure to obey a lawful order other than a lawful general order or regulation are:

(1) That a member of the armed forces issued a certain lawful order;

(2) That the accused had knowledge of the order;

(3) That the accused had a duty to obey the order; and

(4) That the accused failed to obey the order.

Manual for Courts-Martial, United States, 1984, Part IV, para. 16*b*(2).

The maximum punishment for this offense is a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months. *Id.*, para. 16*e*(2).

[5] The elements of willful disobedience of a superior commissioned officer are:

(1) That the accused received a lawful command from a certain commissioned officer;

(2) That this officer was the superior commissioned officer of the accused;

(3) That the accused then knew that his officer was the accused's superior commissioned officer; and

(4) That the accused willfully disobeyed the lawful command.

Id., para. 14*b*(2).

The maximum punishment for this offense is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years. *Id.*, para. 14*e*(2).

[6] *Id.*, para. 14*c*(2)(b).

[7] 13 C.M.R. 135 (C.M.A. 1953).

[8] *Keith*, 13 C.M.R. at 136.

[9] *Id.* at 138-39.

[10] United States v. White, 19 M.J. 662, 666 (C.G.C.M.R. 1984) (quoting United States v. Quarles, 1 M.J. 231, 232 (C.M.A. 1975)).

[11] 16 C.M.R. 52 (C.M.A. 1954).

[12] *Id.* at 54-55.

[13] United States v. Landwehr, 18 M.J. 355, 357 (C.M.A. 1984).

United States v. Landwehr. In *Landwehr* a commander found one of his soldiers away from his duty station.[14] He ordered the soldier back to work. The soldier disobeyed the order and subsequently was charged and convicted for violating article 90. On review, the court held that even though the commander had ordered the accused to comply with a preexisting duty, he had issued that order to advance a proper military function.[15] Accordingly, the accused's disobedience properly was punishable under UCMJ article 90.[16]

Whenever a defense counsel must defend an accused that has been charged with violating article 90, he or she carefully should examine the nature of the order that the accused allegedly has disobeyed. Under what circumstances was the order given? What act was the accused to perform? Did the accused owe a preexisting duty to perform the act? Is the alleged violation punishable under another, more specific article? If the "personal flavor" articulated by the Court of Military Appeals is absent, the counsel may argue that the accused has been mischarged. On the other hand, if the order *was* personal in nature and was issued by the convening authority, the counsel should move to disqualify the convening authority from referring the case to trial.[17] Captain Smith.

Appointment Documents As "Personnel Records" in Aggravation

As military practitioners well know, an accused's personnel records often are a prime source of material for the Government's case in aggravation during the presentencing phase of trial. Although trial counsel routinely introduce an accused's "Personnel Qualification Records"[18] during presentencing, they also commonly present records of nonjudicial punishment[19] and other "adverse actions." Practitioners should be aware, however, of the admissibility—and the limitations on admissibility—of personnel documents that are used less frequently, such as enlistment or commissioning papers.

Reviewing an accused's sentence in *United States v. Dwight*,[20] the Army Court of Military Review examined the admissibility of the accused's application for appointment to active duty. At trial, the Government had sought to introduce this document to show that, while serving in the United States Navy ten years earlier, the accused had been arrested by Italian police for cultivating three marijuana plants. The accused subsequently had applied for appointment as an officer in the United States Army Nurse Corps. Because he had an arrest record, the Department of the Army had required him to obtain a "waiver of disqualification" before it would grant him a commission. Accordingly, the accused's application for appointment included an affidavit that confirmed the factual basis of his arrest by Italian police, stated that he had been "substance free" following this incident, and requested a waiver of the offense.

At trial, the military judge admitted these documents over defense objection as evidence "indicating part of the history of the accused."[21] The Army Court of Military Review upheld the ruling, finding that the military judge properly had admitted the application as a personnel record under Rule for Courts-Martial (R.C.M.) 1001(b)(2).[22] This rule permits the Government to present as evidence at sentencing "copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused."[23] The court reasoned that because Dwight had been in the Navy when he had committed his prior misconduct, the application and waiver form had "a direct bearing on evaluating the 'character of prior service of the accused' and his 'past military ... conduct, performance, and history.'"[24] In a footnote, however, the court cautioned:

> It is important to note that we have not concluded that arrest information in a commissioning application will always be admissible as a personnel record. Indeed, only the unique facts of this case have persuaded us that the information concerning the

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[14] *Id.* at 357.

[15] *Id.*

[16] *Id.*

[17] *See generally* United States v. Marsh, 11 C.M.R. 48 (C.M.A. 1953) (convening authority issued special travel orders to accused who was absent without leave after the accused was apprehended in another location); United States v. Gordon, 2 C.M.R. 161 (C.M.A. 1952) (accused broke into convening authority's house); United States v. Trahan, 11 M.J. 566 (A.F.C.M.R. 1981) (accused disobeyed convening authority's written order not to drive on base).

[18] Dep't of Army, Forms 2A and 2-1, Personnel Qualification Record, parts 1 and 2 (Jan. 1973).

[19] Dep't of Army, Form 2627, Record of Proceedings under Article 15, UCMJ (Aug. 1984).

[20] CM 9001598 (A.C.M.R. 17 Apr. 1991) (mem. op. on reconsideration) (unpub.), *pet. denied*, CM 9001598 (C.M.A. 30 Sept. 1991).

[21] *Id.*, slip op. at 2.

[22] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(2) [hereinafter R.C.M.].

[23] *Id.*

[24] *Dwight*, slip op. at 3.

> arrest and the appellant's attitude toward drug offenses are [sic] accurate, complete, and otherwise admissible under the provisions of R.C.M. 1001(b)(2) and (4).[25]

Indeed, case law shows that enlistment and commissioning papers generally are not admissible. In *Dwight*, the accused's commissioning application pertained to his prior military service. Documents of this nature, however, usually will reflect only an accused's civilian background, and not his [or her] "past *military* efficiency, conduct, performance, and history"[26] and, therefore, will not be admissible.

The Navy Court of Military Review, discussing evidence of prior civilian misconduct reflected in an accused's enlistment contract, asserted that

> past derelictions ... should not follow a member into military service. Once a member qualifies for entry, his [or her] past misdeeds should not be held against him [or her] and he [or she] should be able to start off with a clear slate. Unless there is a reason to question the validity of an enlistment, or the circumstances constitute a proper matter for rebuttal, the conditions of enlistment would not appear to be relevant in a court-martial proceeding.[27]

Thus, to be admissible, personnel records must relate to the accused's past conduct and performance after he or she entered military service.[28]

Furthermore, that an enlistment form shows that an accused held a military status when he or she engaged in preenlistment misconduct does not mean that this document invariably may be admitted as a personnel record to prove that misconduct. In *United States v. Peyton*,[29] for instance, the Army Court of Military Review found inadmissable as aggravation evidence an enlistment application that contained entries describing the accused's preservice experimentation with marijuana and his subsequent discharge from the Air Force Delayed Entry Program.

More recently, the Army court held that the Manual for Courts-Martial does not permit the Government to bootstrap an accused's criminal arrest record through the introduction of so-called "personnel records" during the case in aggravation. In *United States v. Delaney*[30] the trial counsel offered in aggravation a copy of the accused's enlistment contract, which reflected a series of juvenile and adult arrests. The military judge erroneously admitted this document into evidence as a personnel record. The accused then made an unsworn statement in extenuation and mitigation in which he tried to explain the derogatory information related in his enlistment contract. The trial counsel responded by offering a Criminal Investigation Command (CID) report that described a background investigation of appellant. The military judge admitted the report under "relaxed" rules of evidence as a rebuttal to the appellant's unsworn statement.

The Army Court of Military Review held that the military judge improperly had admitted the CID report as rebuttal evidence, emphasizing that the judge never should have admitted the "rebutted" enlistment contract in the first place.[31] The court stressed,

> The appellant's arrest record was not admissible for *any* purpose. Unlike the Federal Rules, the Manual for Courts-Martial provides only for the consideration of "prior convictions"[32] and not of "any prior criminal record." Similarly, the Military Rules of Evidence permit proof of character by way of extrinsic evidence of conviction and not by extrinsic evidence of one's criminal arrest record....
>
> "Bootstrapping" ... impermissible information to a personnel record cannot alter this result: "what the government cannot successfully introduce into evidence through the front door it cannot successfully introduce through the back door via an administrative record-keeping regulation."
>
> ... [T]he military judge abused his discretion in admitting evidence of the appellant's civilian arrests ... on the basis of the thinly veiled subterfuge of "personnel records."[33]

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[25] *Id.*, slip op. at 5 n.1. The court also noted that a military judge may admit "evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." *Id.*, slip op. at 5 (quoting R.C.M. 1001(b)(4)). The court found that the document was independently admissible on this basis. *Id.*; *see also* United States v. Wright, 20 M.J. 519 (A.C.M.R. 1988); United States v. Honeycutt, 6 M.J. 751 (N.C.M.R. 1978). Because this note deals primarily with R.C.M. 1001(b)(2), it will not address this second basis for admission.

[26] R.C.M. 1001(b)(2) (emphasis added).

[27] United States v. Martin, 5 M.J. 888, 889 (N.C.M.R. 1978) (quoting United States v. Galloway, No. 761677, slip op. at 3 (N.C.M.R. 14 Sept. 1976) (unpub.)) (citations omitted).

[28] *Id.*

[29] SPCM 19880 (A.C.M.R. 31 July 1984) (unpub.), *pet. denied*, 20 M.J. 299 (C.M.A. 1985).

[30] 27 M.J. 501 (A.C.M.R. 1988).

[31] *Id.* at 504 (remarking that "[t]he statements which the document purportedly rebutted would not have been made in the first instance but for the erroneous admission of the evidence of civilian arrests").

[32] *See* R.C.M. 1001(b)(3).

[33] 27 M.J. at 503-04 (citations omitted).

These decisions reveal that an accused's enlistment papers are, by no means, admissible per se as sentencing evidence merely because they are filed with his or her personnel records.[34] Accordingly, defense counsel should be alert to improper Government attempts to bootstrap civilian misconduct contained in an enlistment or commissioning application. Captain Wells.

Court of Military Appeals Does Not "Waiver" on Command Influence

The Court of Military Appeals long has recognized that improper command influence is a mortal enemy of the military justice system.[35] In two recent cases, *United States v. Sparrow*[36] and *United States v. Kirkpatrick*,[37] the court reiterated its concern over attempts to bring the "command" or "command policies" into the deliberation rooms of courts-martial.[38] *Sparrow* and *Kirkpatrick* exemplify the subtle and not-so-subtle means by which illegal command influence can enter the courtroom. Because of the potential prejudice to the accused, trial defense counsel—whether involved in a hotly contested case or in a routine guilty plea—must be sensitive to the many forms of improper command influence.

In *Sparrow*, the trial counsel stated in his closing argument on presentencing, "General Graves has selected you. He said, 'Be here. Do it. You have good judgment. I trust you. I know you will do the right thing.'"[39] Defense counsel did not object and the military judge made no comment.

In *Kirkpatrick*, the military judge instructed the sentencing panel to consider, *inter alia*,

> the nature of the offenses, particularly the fact that one of the offenses involve[ed] marijuana, ... all the time and money that the Army consumes each year to combat marijuana, and [that the accused was] a senior noncommissioned officer directly in violation of that open, express, notorious policy of the Army: Though [sic] shalt not.[40]

As in *Sparrow*, the trial defense counsel raised no objection to this improper exhortation.

Considering these cases, the court found that both statements constituted error. In *Kirkpatrick* the court found that this error had prejudiced the accused substantially, while in *Sparrow* the court found that it had not. In both cases, however, the court had to address squarely the issue of waiver, because in neither case did the trial defense counsel object to the improper comments. The Court of Military Appeals historically has taken a special interest in cases that involve unlawful command influence—or even the specter of this influence—and in these cases the court has relaxed its strict application of the waiver doctrine.[41]

Even if waiver does not forestall an accused's appeal, the court will scrutinize closely the defense counsel's failure to object when it considers the degree to which a judicial error may have prejudiced the accused. For instance, the *Sparrow* court, in finding no prejudice, pointedly remarked that the defense counsel, "who ... [had been] in the best position to assess the magnitude of the effect of trial counsel's remarks on the members, [had not felt] ... compelled to object ...."[42] Thus, the court's relaxation of the waiver rules in appeals in which the appellant has alleged unlawful command influence is not a panacea for a defense counsel's failure to preserve and litigate an issue at trial. Rather, it is the Court's recognition that the injection of improper command influence in courts-martial, or even the appearance of it, is susceptible to a "sinister interpretation."[43] *Sparrow* demonstrates that defense counsel must object strenuously to the error at trial to prevent a later finding of harmless error on appeal.

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[34] *Cf.* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 403 (permitting a military judge to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members).

[35] *See* United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987).

[36] 33 M.J. 139 (C.M.A. 1991).

[37] 33 M.J. 132 (C.M.A. 1991).

[38] *Sparrow*, 33 M.J. at 141; *Kirkpatrick*, 33 M.J. at 133; *see also* R.C.M. 1001(g) ("Trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities or any policy directive relative to punishment.").

[39] *Sparrow*, 33 M.J. at 139.

[40] *Kirkpatrick*, 33 M.J. at 133.

[41] *Sparrow*, 33 M.J. at 141 (citing *Thomas*, 22 M.J. at 397). Significantly, although the court did not apply waiver in *Kirkpatrick* or *Sparrow*, in *Sparrow* it warned trial defense counsel that it "might, in other circumstances, apply the rule of waiver." *Id.* (citing R.C.M. 1001(g) (failure to object to improper argument waives error)); *see also* R.C.M. 1005(f) (failure to object to instruction or the omission of an instruction waives the error).

[42] *Sparrow*, 33 M.J. at 141.

[43] *Id.*

In finding plain error in *Kirkpatrick*, the Court of Military Appeals relied heavily upon *United States v. Grady*.[44] In *Grady*, the trial defense counsel initially had broached the subject of command policy on drug abuse during voir dire. Subsequently, during closing arguments on sentencing, the assistant trial counsel also referred to command policy, using language similar to the improper instruction in *Kirkpatrick*.[45] The trial defense counsel did not object and military judge gave no curative instructions until a panel member specifically asked if the command policy had been admitted as evidence. The military judge then instructed the panel that the command policy was irrelevant to the sentencing determination.[46] On review, the Court of Military Appeals found that the military judge's failure to restrict the arguments of counsel constituted plain error that substantially had prejudiced the accused, even though the trial defense counsel had posed no objection—and indeed, had been the first party to introduce command policy into the proceedings.

In discussing *Grady*, the court observed that the military judge's conduct in *Kirkpatrick* actually was more egregious than the conduct of the judge in *Grady*. It pointed out that in *Kirkpatrick* the military judge did not merely fail to correct improper comment on command policy, but specifically instructed the panel to consider command policy in its sentencing deliberations.[47]

The Court of Military Appeals remains vigilant in its watch for the specter of unlawful command influence. Trial defense counsel, however, must not rely upon the court's vigilance to rescue objections that they miss through sloth or that they withhold for tactical reasons. A failure to object may harm the accused in the determination of prejudice even when it does not constitute a waiver. Moreover, the court has given fair warning that the waiver doctrine's shadow soon may pass over the improper injection of the command or command policy into courts-martial proceedings. Captain Lawlor and Captain Norris.

Defense Counsel Need to Object to the Benchbook Instruction on Pretrial Confinement Credit

A recent Court of Military Appeals decision, *United States v. Balboa*,[48] illustrates the problems that can arise when a military judge instructs panel members about automatic sentence credit for pretrial confinement. Balboa's commander had placed him in pretrial confinement. Balboa remained in confinement until the conclusion of his trial, sixty-eight days later.

At the presentencing phase of the trial the military judge, with the agreement of the defense counsel, gave the following sentencing instruction from the Military Judges' Benchbook:[49]

> Now, in determining an appropriate sentence in this case, you should consider ... that this accused has spent sixty-eight days in pretrial confinement. *In this connection, you should also realize that if you do adjudge confinement as part of your sentence, the sixty-eight days spent in pretrial confinement will be credited against any sentence to confinement that you may adjudge. This credit will be given by the authorities at the correctional facility where the accused is sent to serve his confinement and it will be credited on a day-for-day basis.*[50]

The military judge further instructed the members to consider all matters in extenuation and mitigation, including "the duration of [the accused's] pretrial confinement."[51] The court members ultimately sentenced Balboa "[to] forfeit all pay and allowances, to be confined for 68 days, plus 12 months, [and] to be discharged from the service with a bad-conduct discharge."[52]

On appeal, Balboa contended that the military judge had erred in telling the members about the automatic sentence credit, that the members had imposed "an excessive sentence in reliance upon possible mitigating action by the convening authority or higher authority,"[53] that the instruction had been inadequate, and that it had permitted the members to nullify the holding in *United States v. Allen*.[54]

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[44] *Kirkpatrick*, 33 M.J. at 134 (citing United States v. Grady, 15 M.J. 275 (C.M.A. 1983)).

[45] *Grady*, 15 M.J. at 275.

[46] *Id.* at 276.

[47] *Kirkpatrick*, 33 M.J. at 134.

[48] 33 M.J. 304 (C.M.A. 1991).

[49] Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 2-37 (C2, 15 Oct. 1986).

[50] *Balboa*, 33 M.J. at 305 (emphasis added by the Court of Military Appeals).

[51] *Id.*

[52] *Id.*

[53] *Id.* at 306.

[54] 17 M.J. 126 (C.M.A. 1984) (holding that an accused is entitled to sentence credit for time spent in pretrial confinement).

Chief Judge Sullivan, writing for the court, found none of these arguments persuasive. The court first ruled that the language of R.C.M. 1001(b)(1), which authorizes the introduction of evidence of "the duration and nature of any pretrial restraint," was broad enough to include the information on automatic sentence credit contained in the military judge's instruction. The court then dismissed Balboa's assertion that in sentencing Balboa to "68 days, plus 12 months" the members had imposed upon him an excessive sentence in reliance on mitigating action by the convening authority. Noting that Balboa had faced a maximum punishment that had included a dishonorable discharge and confinement for twenty-eight years and six months, the court held that a sentence of confinement for "68 days, plus 12 months," seriously could not be considered inappropriate. The court also expressed grave doubts that R.C.M. 1005(e)(3) proscribes panel members' knowledge of a definite and certain sentence reduction for pretrial confinement.[55] It noted that "[i]f there was some doubt in this regard, it was incumbent on [the accused] to request that the military judge rule on this question and fashion an express instruction on this matter."[56]

Finally, the court addressed what it considered to be the substance of Balboa's argument on appeal—that the military judge's instructions as a whole had permitted the panel members to nullify the Court of Military Appeals' decision in *United States v. Allen.* Balboa contended that the military judge's instruction on automatic sentence credit was incomplete because it failed to tell the members how to treat this credit in their deliberations. The obvious result, he claimed, was that the members deliberately and improperly erased the sixty-eight days credit to which he was entitled by specifically adding sixty-eight days to his sentence. The court, however, dismissed this assertion, observing that "the instructions as a whole suggest that pretrial confinement is a matter of mitigation."[57] It noted, moreover, that a panel may consider even credited pretrial confinement in fashioning a less severe sentence. The court added that neither the decision in *United States v. Allen*, nor the Manual for Courts-Martial, precluded the members from fashioning an appropriate sentence of confinement in view of time already served. The Court of Military Appeals finally remarked that, in any event, Balboa had not objected to the instruction or to the sentence, and concluded that he thus had waived any non-plain error.

In essence, *Balboa* appears to permit a court-martial to determine the appropriate duration of an accused's post-trial confinement and to insulate that determination from any reduction stemming from pretrial confinement credit. In *Balboa* the members evidently determined that the accused deserved twelve months' confinement after trial. The Court of Military Appeals held that the members not only could consider Balboa's sixty-eight days' credit, but also could add sixty-eight days to the sentence to ensure that a sentence of twelve months' confinement actually would be imposed.

Senior Judge Everett disagreed with the reasoning of the majority. He concurred in the result solely because the defense counsel had failed to object to the military judge's instruction. The senior judge objected that the majority's decision effectively allowed the court-martial to erase the holding in *Allen*, commenting,

> It seems curious (and more than coincidental) that the confinement adjudged was "68 days, plus 12 months"—not 14 months or 15 months—when the court-martial members knew that their announced sentence to confinement would be reduced by precisely 68 days. This Court does not need an appellate crystal ball to discern the real likelihood that, as a practical result of the members' action, appellant has been denied the legally required credit for his pretrial confinement.[58]

That Chief Judge Sullivan and Senior Judge Everett both mentioned the issue of waiver demonstrates that the defense counsel in a case involving pretrial confinement should object to the *Benchbook* instruction on automatic confinement credit as given in *Balboa.* If the military judge is determined to instruct on the issue, defense counsel should offer a substitute instruction that preserves the client's *Allen* credit by emphasizing to the members that they must not add pretrial confinement credit to whatever they determine to be an appropriate sentence in the case. Captain Pope.

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[55] R.C.M. 1005(e)(3) expressly provides that sentencing instructions must include "[a] statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority ...."

[56] *Balboa*, 33 M.J. at 306. The court then cited R.C.M. 1005(f), which states:

> Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify in what respect the instructions were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

Balboa, 33 M.J. at 306 n.3; R.C.M. 1005(f).

[57] *Balboa*, 33 M.J. at 307.

[58] *Id.* at 308.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Cross-Dressing as a Military Offense

In *United States v. Guerrero*[1] the Court of Military Appeals held that cross-dressing in public by a military member may constitute an offense under the first two clauses of article 134 of the Uniform Code of Military Justice (UCMJ).[2] This ruling effectively refined the court's previous decision holding cross-dressing by a service member on a military installation to be an offense chargeable under article 134.[3]

Virgilio Guerrero, a Navy petty officer first class (E-6), was convicted of two specifications of dressing "as a woman under such circumstances as were prejudicial to good order and discipline in the Navy and of a nature to bring discredit upon the Navy."[4] The first specification arose when Guerrero met a young fireman apprentice (E-1) named Beatty at a bowling alley. Guerrero invited Beatty to his off-base apartment for drinks. At his apartment, Guerrero poured Beatty a drink and then went into another room. He emerged shortly thereafter "dressed in a long-haired wig, makeup, miniskirt, and a blouse."[5] Beatty, believing Guerrero wanted to have sex with him, quickly departed. As Beatty was leaving, however, Guerrero said, "I thought you had experienced it. I'll have to show you sometime."[6]

Two other witnesses provided the basis for Guerrero's conviction of the second cross-dressing specification. A Radioman Seaman (E-3) Dennis testified that he was Guerrero's neighbor in the off-base apartment complex. Dennis said that once, while opening the windows in his apartment, he had noticed Guerrero standing in his own bedroom dressed in women's clothing and wearing a wig. The apartment complex manager, a retired Navy master chief boiler technician named Sesley, testified that on two occasions he also had seen Guerrero dressed in women's clothing. The first time, he had noticed Guerrero "just passing by one night;" the second time, Guerrero had visited Mr. Sesley's apartment dressed in a "skirt, wig [and] makeup," seeking help "because he had locked himself out of his apartment."[7]

The court affirmed Guerrero's conviction. It noted, however, that many situations exist when cross-dressing is neither prejudicial to good order and discipline, nor of a nature to bring discredit on the armed forces.[8] The court remarked that cross-dressing for the entertainment of others long has been recognized as lawful, citing Flip Wilson's portrayal of "Geraldine" and Dustin Hoffman's portrayal of a woman in "Tootsie" as two examples of lawful cross-dressing.[9]

In affirming the conviction, the court emphasized that cross-dressing per se is not an offense under the UCMJ. "Rather, it is (1) the time, (2) the place, (3) the circumstances, and (4) the purpose for the cross-dressing, all together, which form the basis for determining if the conduct is 'to the prejudice of good order and discipline ... or was of a nature to bring discredit upon the armed forces.'"[10] The court added that "if a service member cross-dresses in the privacy of his [or her] home, with his [or her] curtains or drapes closed and [with] no reasonable belief that he [or she] was being observed by others or bringing discredit to his [or her] rating as a petty officer or to the U.S. Navy, it would not constitute an offense."[11]

Aside from identifying cross-dressing for entertainment purposes and cross-dressing in private as permissible acts of cross-dressing, the court gave little guidance to practitioners on how to apply its four-prong analysis. Presumably, the four factors are equal in weight and should be applied on a totality of the circumstances approach.

All four factors, however, might not be applicable in every situation. For example, a service member who cross-dresses in public to satisfy a sexual fantasy or a prurient interest seemingly would be subject to criminal sanctions under the UCMJ no matter when the cross-dressing actually occurs. In this situation, the actual time is unimportant because the cross-dressing occurs in public and the circumstances and the purpose are service discrediting. On the other hand, time would be an important consideration if a service member were to cross-dress to attend a Halloween party. Cross-dressing in this instance should not violate the UCMJ because the conduct occurs

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[1] 33 M.J. 295 (C.M.A. 1991).

[2] Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1988) [hereinafter UCMJ]. Article 134 proscribes, *inter alia*, "all disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredit upon the armed forces ...." *Id.*; *see also* Manual for Courts-Martial, United States, 1984, Part IV, para. 60(b),(c).

[3] United States v. Davis, 26 M.J. 445 (C.M.A. 1988).

[4] *Guerrero*, 33 M.J. at 296.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 297.

[8] *Id.* at 298.

[9] *Id.*

[10] *Id.*

[11] *Id.*

under circumstances that are acceptable to society and therefore is not service discrediting.

Counsel should evaluate any potential cross-dressing offense using the *Guerrero* analysis. The ultimate question, however, remains the same—is the conduct, under the circumstances, either prejudicial to good order and discipline or service discrediting? If so, it is an offense under article 134. Major Hunter.

Court of Military Appeals Decides Role of Judicial Notice in Urinalysis Prosecutions

Recently, in *United States v. Hunt*[12], the Court of Military Appeals decided whether a urinalysis "chain of custody, laboratory report, and judicial notice,"[13] taken together, were legally sufficient to prove a violation of UCMJ article 112a. Finding this method of prosecuting a urinalysis case to be fatally flawed, the court expressly rejected the Government's argument that judicial notice is a "lawful substitute"[14] for expert testimony.

At trial, Private (PVT) Isaac Hunt had pleaded not guilty to one specification of wrongfully using cocaine, as reflected by a "cocaine-positive" urinalysis test. The Government then called three witnesses to show that it had maintained a proper chain of custody from the time the accused provided a urine sample until the Government offered the results of the urinalysis into evidence at trial. The Government, however, presented absolutely no live testimony to prove the validity of the urinalysis test the laboratory performed on PVT Hunt's sample. Rather, the Government invoked Military Rule of Evidence (M.R.E.) 201[15] and asked the military judge to take judicial notice of certain facts relating to the urinalysis test. Following the methodology suggested by several commentators,[16] the trial counsel asked for judicial notice of the following facts: (1) that after cocaine is ingested, the human body converts it into metabolites that it excretes into the urine; (2) that cocaine's principal metabolite is benzoylecgonine (BZE); (3) that the human body does not produce BZE naturally; (4) that the urinalysis test can identify BZE conclusively through correctly performed radioimmunoassay (RIA) and gas chromatography and mass spectrometry (GC/MS) testing; and (5) that the lab that tested PVT Hunt's urine sample regularly uses RIA and GC/MS testing.[17]

In an interesting opinion, Chief Judge Sullivan noted that both the United States and the appellant focused on whether the judge properly had taken judicial notice of these facts, and whether a military judge may notice judicially the various facts that relate to urinalysis testing. Chief Judge Sullivan's remarks are not surprising given the several Army Court of Military Review decisions[18] that recently held that a judge may not take notice that a *particular* urine sample—in particular, an accused's sample—was analyzed properly. Chief Judge Sullivan, however, questioned whether the evidence that the military judge noticed judicially was constitutionally sufficient to support a conviction, even if one assumed that judicial notice is legally permissible and was taken properly. He concluded that it was not, stating, "if scientific-test evidence is used by the prosecution"[19] to prove *wrongful* use of a controlled substance, the Government "must provide a rational basis for understanding this evidence."[20] The Government's failure to give the finder of fact "sufficient expert evidence" left the prosecution fatally defective.

Hunt signals that the Government must present expert testimony in urinalysis prosecutions no matter how many facts the judge will notice judicially. The court emphasized that a constitutionally sufficient prosecution requires "expert testimony explaining ... testing data for the purpose of showing wrongfulness"[21] or evidence describing "the actual scientific tests conducted on ... [the] urine sample."[22]

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[12] 33 M.J. 345 (C.M.A. 1991).

[13] *Id.*

[14] In *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987), the Court of Military Appeals ruled that a "pure" paper-case urinalysis prosecution—that is, one in which the military judge admits only documents evidencing the urinalysis test and its results and the Government presents no live testimony—was legally insufficient to support a conviction. The court stated that "testimony interpreting the tests or some other lawful substitute in the record" was required. *Id.* at 312. Several commentators later interpreted "some other lawful substitute" to mean that trial counsel could use judicial notice to avoid the need to present expert testimony. *See, e.g.*, Wayne E. Anderson, *Judicial Notice in Urinalysis Cases*, The Army Lawyer, Sept. 1988, at 19; Michael Davidson & Willis Hunter, *Urinalysis Cases and Judicial Notice*, The Army Lawyer, July 1990, at 34.

[15] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 201 [hereinafter Mil. R. Evid.]. Military Rule of Evidence (M.R.E.) 201 requires a military judge to "take judicial notice of [adjudicative] facts if requested by a party and supplied with the necessary information" of any facts which is "not subject to reasonable dispute" because the fact is "either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Mil. R. Evid. 201(b),(d).

[16] *See Hunt*, 33 M.J. at 346; *see also* Anderson, *supra*, note 3 at 23; Davidson & Hunter, *supra* note 3 at 37-38.

[17] 33 M.J. at 346.

[18] *See* United States v. Harper, 32 M.J. 620 (A.C.M.R. 1991).

[19] 33 M.J. at 347.

[20] *Id.*

[21] *Id.*

[22] *Id.*

This decision is important for several reasons. First, in *Hunt* all three judges agreed on the quality and quantity of evidence that the Constitution requires to support a urinalysis conviction. The departure of one particular judge from the court will not call into question immediately the decision's precedential value. Second, *Hunt* signals that the Court of Military Appeals wants the public, the military in general, and the players in the military justice system to perceive the urinalysis program as absolutely fair and reliable. Accordingly, the court will reject "shortcuts," such as the use of judicial notice to avoid the effort and expense of presenting expert testimony, in proving illegal drug use because these shortcuts do not advance either reliability or fairness. Third, the court distinguished the use of scientific test evidence to prove a urinalysis case from the use of scientific evidence in other criminal drug prosecutions. In federal district courts, civilian prosecutors must call an expert to testify that a substance seized from the accused is actually marijuana. In courts-martial, *United States v. Strangstalien*[23] and its progeny allow trial counsel to avoid calling the laboratory examiner. A lab report that reflects that a particular substance is marijuana is admissible and the author of the report must appear to testify *only* if requested by the defense. Notably, in *Hunt* the Court of Military Appeals could have decided that judicial notice of particular facts, combined with the permissible inference allowed in *United States v. Mance*,[24] is constitutionally sufficient to support a finding of guilty in urinalysis prosecutions *unless* the accused objected to the reliability of the urinalysis test. Had PVT Hunt defended on the theory that his urine sample had been switched with another, or that he unknowingly had ingested the controlled substance (the "spiked" food or drink scenario), rather than by disputing the accuracy of the test, the court could have interpreted *Strangstalien* to authorize some urinalysis prosecutions based solely on judicial notice of scientific testing procedures. *Hunt* is significant chiefly because the court instead adopted a bright-line approach to the evidence needed to support a criminal prosecution.

After *Hunt*, trial counsel should continue to use judicial notice in urinalysis prosecutions, if appropriate, but must present some expert testimony to give the finder of fact a rational basis upon which to convict. Major Borch.

Contract Law Note

Fiscal Law Update: Funding Reprocurement Contracts

On August 12, 1991, the Comptroller of the Department of Defense (DOD) issued a policy memorandum that radically altered the procedure for funding reprocurement contracts.[25] The memorandum requires federal agencies to obligate only current funds when they award reprocurement contracts.[26] To require the use of current funds in a reprocurement following a termination for default departs from well-established contract and fiscal policy. This change will affect command operating budgets significantly by requiring—in essence—that the government budget supplies and services twice whenever a termination occurs after original funding expires. This note will analyze several Comptroller General decisions on the funding of reprocurement contracts after a termination for default and the evolution of these decisions as

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[23] 7 M.J. 225 (C.M.A. 1979); *see also* United States v. Vietor, 10 M.J. 69 (C.M.A. 1980); United States v. Broadnax, 23 M.J. 389 (C.M.A. 1987).

[24] 26 M.J. 244 (C.M.A. 1988) (holding that proof of presence of drug metabolite in urine allows permissible inference that the accused knowingly consumed drug).

[25] The full text of the memorandum is set forth below:

> MEMORANDUM FOR Assistant Secretary of the Army (Financial Management); Assistant Secretary of the Navy (Financial Management); Assistant Secretary of the Air Force (Financial Management and Comptroller); Directors of Defense Agencies; Director, Washington Headquarters Services
>
> SUBJECT: Contract Defaults Resulting in Reprocurement Contract Actions
>
> In a July 12, 1991, memorandum, subject as above, the Air Force Deputy for Budget asked for guidance on how to fund reprocurement actions. Since this guidance applies equally to all DOD components, this memorandum is being sent to all DOD components.
>
> Previous DOD guidance on the use of expired funds, dated June 13, 1991, requires current appropriations to be used for contract changes. As you know, DOD has defined contract changes to include changes in scope as well as other changes that result in additional contractor billable costs. A reprocurement action falls within this definition. Therefore, unused funds from an expired account may not be used to fund reprocurement actions. Rather, such contracts should be funded with current year appropriations.
>
> If you have further questions on this matter, please contact Mr. Nelson Toye, Director for Accounting Policy, or Mr. Adam Shaw or Ms. Susan M. Williams at (703) 697-6149.
>
> /s/ Alvin Tucker
> Deputy Comptroller
> (Management Systems)

[26] As used in this note, the term "reprocurement contract" refers to a contract awarded after the default termination of a previous contract to acquire supplies or services that the government failed to acquire because of the default.

the Comptroller General has applied them to the funding of replacement contracts following certain terminations for the convenience of the government.

The Federal Acquisition Regulation[27] fixed-price supply and service default clause[28] empowers the government to acquire from another source supplies or services similar to those called for by the terminated contract. The clause also renders the defaulted contractor liable to the government for any excess costs that the government incurs in this reprocurement.[29] The government, however, may seek this remedy only if it has awarded a reprocurement contract to a second contractor. To accomplish this, the government must have monies available to fund the second contract. Historically, federal agencies have drawn these funds from the undisbursed portion of the funds obligated on the terminated contract. The memorandum ends this practice—at least within the Department of Defense.

As early as 1902, the Comptroller General authorized a federal agency to use funds from a contract that it had terminated for default as consideration for a reprocurement contract. In this early case, the contractor had failed to perform an intergovernmental order, but the ordering agency did not learn of the this failure until after the funds expired. The Comptroller General ruled that the agency had obligated the funds validly before the end of the fiscal year and, therefore, could use them in a subsequent year for the reprocurement contract.[30]

The Comptroller General has restated this principle on numerous occasions.[31] That funds which were obligated properly for the bona fide needs of the fiscal year upon award of the original contract shall remain available for a reprocurement contract in a subsequent fiscal year is now a well-established element of procurement law. To claim the benefit of the doctrine, however, an agency must show that (1) it terminated the original contract for default; (2) it has a continuing bona fide need for the items for which it seeks reprocurement funding; (3) it has awarded the reprocurement contract without undue delay; and (4) the reprocurement contract contemplates only the performance left uncompleted by the termination of the original contract.[32] The Department of the Army adopted these principles expressly, incorporating them into the current Army procurement regulation.[33]

The Comptroller General's early decisions on the funding of reprocurement contracts placed great emphasis on whether previously executed contracts had documented formally the obligations of funds.[34] "[T]he obligation established for the original contract is not extinguished because the replacement contract is considered to represent a continuation of the original contract obligation rather than a new contract."[35] If no document supported an obligation, however, the fund expired and could not be used for reprocurement.

These early Comptroller General decisions also analyzed the issue of control over the nonperformance of the original contract.

> If all replacement contracts were treated as new contracts, an agency would be required to deobligate prior year's funds which support the defaulted contract, and reprogram and obligate current year funds, even though the particular expenditure was budgeted for the prior year. Because contractor defaults can neither be anticipated nor controlled, a great deal of uncertainty would be introduced into the budgetary process. In some cases agencies would have to request supplemental appropriations to cover these unplanned and unprogrammed deficits[,] which could result in costly program overruns.[36]

If the government had had no control over the default, it properly could use the original funds for a reprocurement contract.

The rule concerning the use of funds from the original defaulted contract on a reprocurement contract does not apply in all instances to contracts terminated for the convenience of the government. The general rule concerning

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[27] *See generally* Fed. Acquisition Reg. (Apr. 1, 1984), 48 C.F.R. ch. 1 (1990) [hereinafter FAR].

[28] FAR 52.249-8.

[29] *Id.* The fixed-price research and development default clause and the fixed-price construction default clause contain similar reprocurement rights. *See* FAR 52.249-9 to -10. The cost reimbursement termination clause, however, contains no analogous provision. *See* FAR 52.249-6.

[30] 9 Comp. Gen. 10 (1902).

[31] *See, e.g.*, 55 Comp. Gen. 1351 (1976); 40 Comp. Gen. 590 (1961); 2 Comp. Gen. 130 (1922); *see also* 34 Comp. Gen. 239 (1954) (expanding principle to allow an agency to use prior year funds when the agency, to settle a contractor's claim, has converted a termination for default to a termination for convenience of the government).

[32] 60 Comp. Gen. 591, 592 (1981).

[33] *See* Army Reg. 37-1, Army Accounting and Fund Control, para. 9-5(e) (30 Apr. 1991).

[34] *See, e.g.*, 2 Comp. Gen. 130, 131 (1922).

[35] 60 Comp. Gen. 591, 592 (1981).

[36] *Id.* at 593.

convenience terminations is simple: When the government terminates a contract for convenience after the original funds have expired, these funds are treated like any other unobligated funds at the end of the period of availability—that is, they have expired and they may not be obligated.[37]

In recent years, the Comptroller General has applied the rationale of decisions on funding of reprocurement contracts after default terminations to uphold the use of otherwise expired funds for certain replacement contracts that the government awarded following terminations for convenience. For instance, in 1988, the Comptroller General altered the general rule concerning the use of funds after a termination for convenience. The Comptroller General ruled that a federal agency may use an appropriation from the previous year for a replacement contract if the agency terminated the original contract for convenience pursuant to a court order.[38] This decision focused closely on whether the government had demonstrated good faith in awarding the original contract and whether the government had caused the contractor's failure to complete the original contract.

The Comptroller General has drawn a clear distinction between a contract modification initiated within the agency that deletes several items from a contract, and an order to terminate for convenience that was issued by a court or other competent outside authority. In the former situation, the contract terminates because the agency has determined, for its own reasons, that the work no longer is needed. Because the agency controls the decision-making process it can weigh the programmatic and budgetary impacts in deciding whether to terminate the contract. The agency is in the best position to make a cost-benefit analysis of each proposed convenience termination because it knows which funds have expired and may not be obligated for reprocurement. Accordingly, when the decision to terminate for convenience rests solely with an agency, to hold that funds from the terminated portion of the work are not available for future obligation—if they otherwise have expired—would not create unreasonable programmatic or budgetary hardship on the agency.[39]

In the latter situation, however, the agency does not control the decision to terminate, nor does the agency have any realistic alternative but to honor a termination order issued by a competent authority. The Comptroller General, likening this situation to the funding of reprocurement contracts after default terminations, ruled explicitly that an agency may use funds originally obligated during the previous year for a contract that a court subsequently ordered terminated for convenience because the award was improper.[40]

As recently as February 1991, the Comptroller General expanded governmental authority to use funds on a replacement contract. If a contracting officer determines sua sponte that an award is improper and terminates the contract for convenience, the agency may use monies that it originally had obligated for that contract to fund a replacement contract, even if the funds otherwise would have expired.[41] The Comptroller General saw no benefit in allowing fiscal policy to force an agency into litigating a losing case simply for the purpose of obtaining the authority to use expired funds for a replacement contract.

Against this backdrop of well-established law, the Department of Defense Comptroller's Office issued its memorandum requiring DOD activities to use current funds for reprocurements following default terminations. The comptroller based this decision—at least in part—on language defining contract changes that appeared in a section of the 1991 Department of Defense Authorization Act[42] amending the rules that govern the use of expired appropriations in the so-called "M" account.

The act states that a contract change occurs whenever the government directs a contractor to perform additional work. It excludes from this definition mere adjustments to pay claims or price increases under contractual price escalation clauses.[43] Congress enacted this legislation in the belief that federal agencies were using expired appropriations to circumvent congressional control over program budgets.[44] By amending 31 U.S.C. §§ 1551-1557, it clearly intended to curb the authority of executive agencies to use expired appropriations for contract changes by which the agencies sought to alter the configurations of end items or to change contractual scopes of efforts.[45]

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[37] *Id.* at 591.

[38] 68 Comp. Gen. 158 (1988) (allowing agency to use prior year's appropriation for resolicitation when court permanently enjoined the performance of the original contract and specifically ordered resolicitation).

[39] 66 Comp. Gen. 625 (1987) (holding that when contractor filed for bankruptcy—but neither accepted nor rejected the contracts under 11 U.S.C. § 365—and the agency and the contractor subsequently agreed to modify the contract to delete items and to ease cash flow problems; agency could not use funds to acquire deleted items from another source).

[40] 68 Comp. Gen. 158, 162 (1988).

[41] Comp. Gen Dec. B-238548 (Feb. 5, 1991) 91-1 CPD ¶ 117.

[42] Pub. L. No. 101-510, § 1405, 104 Stat. 1676 (1990) (codified at 31 U.S.C. § 1553(c)(3)).

[43] 31 U.S.C. § 1553(c)(3).

[44] H. Rep. No. 665, 101st Cong., 2d Sess. 20 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2931, 2962.

[45] *See Control and Financial Management of Expired Appropriations Accounts, 1990: Hearings Before the Senate Comm. on Governmental Affairs*, 101st Cong., 2d Sess. (1990).

The memorandum's reliance on the changes to 31 U.S.C. § 1553 is misplaced. A reprocurement contract is not a modification to a prior contract, as the memorandum erroneously suggests. Moreover, the memorandum fails to recognize the lack of agency control over a termination when the contractor defaults on a contract. Finally, the memorandum apparently ignores the programmatic and budgetary considerations inherent in the requirement to use current funds for reprocurement contracts.

The policy most likely will cause programmatic delays. Moreover, it probably will cause needed work to go entirely unperformed if an agency cannot obtain current funds to acquire essential supplies or services. Accordingly, contract law advisors should consider the programmatic impacts inherent in this change of fiscal policy whenever they analyze a proposal to exercise a default termination.

Although the memorandum, by its own terms, is limited to reprocurement contracts following default terminations, its underlying rationale applies equally well to the funding of replacement contracts after convenience terminations that result from improper awards. For DOD agencies, the memorandum effectively reverses the entire line of Comptroller General decisions discussed in this note.

Given the statutory authority of an agency head to divide apportionments administratively,[46] the only prudent course of action for contract law and administrative law practitioners at present is to advise policymakers to comply with the requirements of the memorandum. Attorneys, however, should note that the DOD is reconsidering the policy articulated in the memorandum.[47] A follow-on note will be published in *The Army Lawyer* when this reconsideration is complete. Major Dorsey.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Louisiana Will and Estate Law: Usufructs, Tutors, and Other Shadowy Creatures of The Civil Code

Introduction: A Tradition of Codal Law

More than any other state in the Union, Louisiana has been blessed with a rich variety of cultural, ethnic, and legal influences. This diverse heritage is reflected in many ways. Louisiana law, for instance, was molded by French and Spanish rule during the eighteenth and nineteenth centuries. The Spanish governed through their written code of civil law, the *Sonita de Partidas*. Later, in the early 1800's, the French used their Napoleonic Code, *Code Noir*, *Projet du Gouvernement*, and *Corpus Juris Civilis* to rule both whites and slaves.

These codal influences eventually resulted in today's Louisiana Civil Code. State legislators have rewritten the Code many times over the years. These repeated amendments have caused Louisiana law to undergo a very unusual evolution. Some provisions of the modern Civil Code, for instance, have as their source the ancient Code of Justinian, which strongly influenced eighteenth century French law. These ancient and archaic influences present both problems and opportunities for modern attorneys.

A common complaint is that the Civil Code often seems almost incomprehensible to attorneys who are unfamiliar with it. Many of its terms appear odd and intimidating to someone who has little experience in the civil law.

These few concerns, however, are far outweighed by the benefits inherent to Louisiana's system. One advantage of civil law is that it is based almost entirely on written statutes. This single concept is the main difference between the civil and common law. Rather than relying on a system of *stare decisis*, Louisiana law provides that judicial decisions constitute only persuasive authority. The Code itself reflects this idea, noting in its very first article, "[t]he sources of law are legislation and custom."[48] Accordingly, to interpret any given point of Louisiana law, one must look first to the Code. The law's reliance on written statutes often simplifies an attorney's job. In researching a given issue, an attorney knows that the Civil Code will be his or her primary source. This creates a simplified hierarchy of law, in which the Code is the ultimate authority.

A second benefit of Louisiana law is that, because the Code is based on the written word, the language of each article of the Code is subject to detailed argument and

[46] 31 U.S.C. § 1514.

[47] Telephone Interview with Susan M. Williams, Office of the Deputy Comptroller (Management Systems), Directorate for Accounting Policy, Office of the Comptroller of the Department of Defense (Nov. 5, 1991).

[48] La. Civ. Code Ann. art. 1 (West Supp. 1991).

interpretation. The manner in which an article is written often is very persuasive to the court. On occasion, Louisiana attorneys may argue convincingly that the placement of a single comma is determinative of a particular issue.

The Code's evolution enables advocates to advance historical arguments. By tracing an article's development through the course of hundreds of years and dozens of revisions an attorney can weave arguments based solely on changing societal needs and values as reflected in the language of the Code.

That the legislature, rather than the courts, decides the law often allows advocates to argue cases that otherwise would be hopeless. A decision by a former court is no more than persuasive evidence—even if the court of previous decision was the Louisiana Supreme Court. The door to the courthouse is always open if one is clever enough to derive innovative and compelling arguments from the Civil Code.

Unfortunately, the idiosyncrasies of the civil law frighten away many attorneys who otherwise might have enjoyed—and thrived under—the Louisiana system. Of more immediate concern to the military, many judge advocates, because of their unfamiliarities with the Civil Code, fear to advise Louisiana residents. This note on Louisiana will and estate law should instill confidence in military attorneys who otherwise might not attempt to help soldiers from Louisiana.

Intestate Succession

The Louisiana Civil Code begins its discussion of wills and estates at article 871. The Code divides successions into two types: testate and intestate.[49] Individuals who succeed by testate succession are called legatees; intestate successors are called heirs.[50] When an estate passes by intestate succession, the doctrine of representation permits a descendant of a favored heir to take the place of the heir if he or she has predeceased the decedent.[51] Representation will not apply, however, if the favored heir survives the decedent—a living person may not be represented by his or her descendants.[52]

Louisiana law separates property into many categories. One important division is the distinction between community and separate property. Community property includes any property acquired during the legal regime (marriage) through the effort, skill, or industry of either spouse; items acquired in exchange for community property; property given to both spouses; the natural and civil fruits of community property; damages awarded for loss or injury to community property; and any other property not classified expressly as separate property.[53] The Code defines separate property as property acquired by either spouse before the marriage; property acquired by a spouse after the marriage but with separate funds; and property acquired by an individual spouse through inheritance or through donations intended for him or her alone.[54]

These distinctions are crucial because the way that chattels and real property devolve under Louisiana law depends largely on their statuses as community or separate property. For instance, if a decedent dies without descendants, his or her surviving spouse succeeds to his or her share of the community property.[55] If the deceased has descendants, however, and the deceased has not disposed of his or her community property by testament, the surviving spouse receives only a legal usufruct over the community property, while the descendants inherit the property itself.[56]

A usufruct is a right derived from the old Roman ideals of *usus* and *fructus*. An individual that receives a usufruct enjoys the use and the fruits of the property in question. Actual ownership of the property itself, however, is retained by another—a person known as the "naked owner."[57] The rights and obligations of a usufructuary depend on whether the community property consists of consumables[58] (property that cannot be used without being expended or consumed) or nonconsumables (property that may be enjoyed without alteration of its substance).[59] Some items that Louisiana has classified as consumables are money, promissory notes, certificates of

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[49] *Id.* art. 873.

[50] *Id.* art. 876.

[51] *Id.* art. 882.

[52] *Id.* art. 886.

[53] La. Civ. Code Ann. art. 2338 (West 1985).

[54] *Id.* art. 2341.

[55] La. Civ. Code Ann. art. 889 (West Supp. 1991); *see also* Giroir v. Dumesnil, 248 La. 1037, 184 So. 2d 1 (La. 1966); Succession of Vicknair, 126 So. 2d 680 (La. Ct. App. 1961).

[56] Succession of Vallette, 538 So. 2d 707 (La. Ct. App.), *writ denied*, 543 So. 2d 20 (La. 1989). La. Civ. Code Ann. art. 890 (West 1985); *see also* Cynthia A. Samuel et al., *Successions and Donations*, 45 La. L. Rev 575 (1984).

[57] La. Civ. Code Ann. arts. 478, 542, 603 (West 1980 & Supp. 1991).

[58] La. Civ. Code Ann. art. 536 (West 1980).

[59] *Id.* art. 537.

deposit, bearer paper, and bales of cotton.[60] On the other hand, land, shares of stock, and other tangible property that is capable of extended use and enjoyment the state has designated as nonconsumables.[61]

If the community property consists of consumables, the surviving spouse (the usufructuary) becomes the de facto owner of these items of property. The survivor may consume, alienate, or encumber this property. When the usufruct ends, however, he or she either must pay the decedent's descendants (the naked owners) the value that the consumed property had at the beginning of the usufruct or must replace it with property of identical quantity and quality.[62]

If the property is nonconsumable, a usufructuary may possess it and derive from it its utility, profit, and advantages. The usufructuary, however, must take care to preserve the property itself. He or she must act as a "prudent administrator" and must deliver the property to the naked owner at the end of the usufruct.[63] When a surviving spouse succeeds to a usufruct over either consumables or nonconsumables, the usufruct normally endures until the surviving spouse remarries, unless the decedent has confirmed the usufruct for life or for a shorter period.

In an intestate succession, property devolves as follows. Separate property passes to the descendants of the deceased. If the deceased had no descendants, the deceased's brothers and sisters succeed to naked ownership of the decedent's separate property and the deceased's surviving parents receive a usufruct.[64] If the deceased had no surviving parents, his or her brothers or sisters succeed to the separate property in full ownership. On the other hand, if the deceased had no brothers or sisters, his or her surviving parents succeed to the separate property in full ownership.[65] Descendants of the decedent's brothers or sisters, however, may take by representation. If the deceased leaves no descendants, parents, or siblings—nor their descendants—his or her surviving spouse would succeed to the separate property.[66] After a surviving spouse come other ascendants—that is, for example, grandparents—and then collateral relatives, such as uncles and aunts.[67]

Testate Succession

To execute a will, a testator must be above the age of sixteen[68] and of sound mind. He or she may dispose of property by means of a testament (*mortis causa*, or in prospect of death) to anyone that exists at the moment of his death.[69]

Perhaps the oddest juridical mechanism under Louisiana law is that of forced heirship. The Louisiana Constitution of 1972 permanently established forced heirship as a legal institution. The state legislature, however, is free to tinker with the *implementation* of this concept. For instance, even though it cannot abolish forced heirship altogether, the legislature can decide who is or is not a forced heir, and what proportion of a decedent's estate may be affected by forced shares.

Forced heirs normally are descendants of the first degree—that is, the decedent's children—who have not attained the age of twenty-three years or who, because of mental incapacity or physical infirmity, cannot care for themselves or administer their estates.

The Code, however, does not necessarily limit forced heir status to descendants of the first degree. A descendant of the second or higher degree—for example, the decedent's grandchild—may claim forced heir status by *representation* of a descendant of the first degree who predeceased the decedent.[70] To do so, the claimant must show that the deceased descendant would not have attained the age of twenty-three years at the donor's death.[71]

A forced share, called the "*legitime*," normally must be reserved for the forced heirs.[72] If a decedent has no forced heirs, his or her testament may dispose of the entire estate.[73] If one forced heir survives the decedent,

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[60] Mariana v. Eureka Homestead Soc. 158 So. 642 (La. 1953); Succession of Chauvin, 242 So. 2d 340 (La. Ct. App.), *aff'd*, 257 So. 2d 242 (La. 1972).

[61] Leury v. Mayer, 47 So. 839 (La. 1908); Succession of Heckert, 160 So. 2d 375 (La. Ct. App. 1964).

[62] La. Civ. Code Ann. art. 538 (West 1980); *see also* 3 Planiol & Ripert, Traité Pratique du Droit Civil Francais 756 (2d ed. Picard 1952).

[63] La. Civ. Code Ann. art. 539 (West 1980).

[64] La. Civ. Code Ann. art. 891 (West Supp. 1991); *see also* Bishop v. Copeland, 62 So. 2d 486 (1952); Note, *Intestate Successions*, 22 Loy. L. Rev. 798 (1976).

[65] La. Civ. Code Ann. art. 892 (West Supp. 1991); *see also* Tenneco Oil Co. v. Hines, 535 So. 2d 855 (La. Ct. App.), *writ denied*, 536 So. 2d 1200, 1201 (La. 1988).

[66] La. Civ. Code Ann. art. 894; (West Supp. 1991); *see also* A.N. Yiannopoulos, *Testamentary Dispositions in Favor of the Surviving Spouse and the* Legitime *of Descendants*, 28 La. L. Rev. 509 (1968); A.N. Yiannopoulos, *Legal Usufructs: Louisiana and Comparative Law*, 14 Loy. L. Rev. 1 (1968).

[67] La. Civ. Code Ann. arts. 895, 896 (West Supp. 1991); *see also* Succession of Turner, 103 So. 2d 91 (La. 1958).

[68] La. Civ. Code Ann. art. 1477; *see also* Succession of Wilson, 213 So. 2d 776 (La. Ct. App.), *writ denied*, 216 So. 2d 305 (La. 1968).

[69] La. Civ. Code Ann. art. 1473 (West 1987). A testator may name as a legatee a child not yet born, as long as the child is conceived not later than the death of the testator and the child is later born alive. *Id.*

[70] La. Civ. Code Ann. art. 1493 (West Supp. 1991).

[71] *Id.*

[72] *Id.* art. 1494.

[73] *Id.* art. 1496; *see also* McCarty v. Trishel, 46 So. 2d 621 (La. Ct. App. 1950).

however, one-fourth of the decedent's net estate must be set aside. Further, one-half of the estate must be reserved as *legitime* if more than one forced heir survives the decedent. Each forced heir then may claim a pro rata share of the *legitime*.

One obvious consequence of forced heirship is that a testator cannot leave his or her estate to someone without reserving these forced portions for his or her children. A testator may disinherit a child, but only for certain reasons specifically enumerated in the Code. For example, a testator may disinherit a child if the child subjects the testator to acts of violence or cruelty, attempts to murder the testator, refuses to support the testator when the testator is in need, or if the child, then a minor, marries without the testator's consent.[74] The testator must express in his or her will the reason for disinheriting the forced heir. A forced heir that has been disinherited may be reinstated after the testator's death if he or she can prove that the stipulated cause for disinheritance actually did not exist or that the heir and the testator reconciled after the alleged act occurred.[75]

A testamentary bequest may impinge on the *legitime* without invalidating the entire will. The excessive disposition, however, must be reduced to bring it into compliance with the forced share requirement.[76] This mandatory reduction of a testamentary disposition is known under the Code as "collation."[77] Only a forced heir may demand a collation; thus, creditors cannot sue for the reduction of an excessive legacy.[78]

Insurance proceeds are not part of the estate. They are merely products of a contractual agreement between the deceased and the named beneficiary. Accordingly, they are not subject to codal provisions governing forced heirship.[79]

The Code specifically proscribes certain testamentary provisions. Any condition that is impossible or contrary to law or morals (*contra bones mores*) is per se invalid. The presence of these conditions, however, will not invalidate an entire testament—only the impossible, illegal, or immoral condition must be excluded.[80]

Louisiana law long has deemed illegal any testamentary provision that attempts to force a legatee to hold property for another person to inherit upon the legatee's death. Thus, a testator may not attempt to leave an item to one person subject to a clause that requires that person to retain the item for the testator's children until the legatee dies or until the children reach majority.[81] The testator may manifest this intent only by instigating a trust in favor of the children.

A testator may, however, leave an item to one person and indicate that another is to receive it if the original legatee does not survive the testator by a particular period of time provided that this period does not exceed ninety days.[82] This arrangement, known as a "vulgar substitution," is not considered illegal or immoral under Louisiana law.

Forms of Testaments

Historically, Louisiana courts strictly have interpreted any Civil Code article that governs the formalities of the executions of testaments. The Code specifically prohibits joint or reciprocal testaments, regardless of whether the testators name each other or a third party as the legatee.[83] Nor may a testator empower a third person to decide who shall be named as a legatee in the testator's will. A testator only may assign quanta or values (either by formula or by a specific sum), and then delegate to the executor the authority to select assets to satisfy those quanta or values. Even then, this delegation must be express.[84]

Neither heirs nor legatees may witness a testament. Should they sign as witnesses, this will not invalidate the entire testament, but any dispositions under the will that favor them are void.[85] Other persons that the Code states may not act as witnesses are children under sixteen years

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[74] La. Civ. Code Ann. art. 1621 (West 1987).

[75] La. Civ. Code Ann. art. 1624 (West Supp. 1991); *see also* Ambrose Succession v. Ambrose, 548 So. 2d 37 (La. Ct. App. 1989).

[76] La. Civ. Code Ann. art. 1502 (West 1987); *see also* Estate of Harvey v. United States, 678 F. Supp. 1268 (E.D. La. 1988).

[77] La. Civ. Code Ann. art. 1502 (West 1987).

[78] *Id.* art. 1504; *see also* Note, *Louisiana Civil Code Article 1505: Valuation of Donations Intervivos to Establish the Mass Estate, the Forced Portion, and the Reduction of Excessive Donations*, 34 Loy. L. Rev. 546 (1988).

[79] American Health & Life Ins. Co. v. Binford, 511 So. 2d 1250 (La. Ct. App. 1987); *see also* La. Civ. Code Ann. arts. 1468, 1469, 1495, 1502 (West 1987 & Supp. 1991).

[80] La. Civ. Code Ann. art. 1519 (West 1987); *see also* Launey v. Barrouse, 509 So. 2d 734 (La. Ct. App. 1988).

[81] La. Civ. Code Ann. art. 1520 (West 1987); *see also* Succession of Flowers, 532 So. 2d 470 (La. Ct. App.), *writ denied*, 534 So. 2d 466 (La. 1988).

[82] La. Civ. Code Ann. art. 1521 (A)(2) (West Supp. 1991).

[83] La. Civ. Code Ann. art. 1572 (West 1987); *see also* Comment, *Vulgar Substitutions: The 1984 Amendment to Article 1521*, 61 Tul. L. Rev. 1515 (1987).

[84] La. Civ. Code Ann. art. 1573 (West 1987); *see also* Hunter, *Delegating Estate Asset Selection*, 34 La. B.J. 78 (1986).

[85] La. Civ. Code Ann. art. 1592 (West Supp. 1991).

of age; persons who are blind, insane, or—under most circumstances—deaf; and individuals whom the criminal laws have declared incapable of exercising civil functions.[86] Verbal testaments are not allowed and have no legal authority whatsoever.[87]

The statutory will is the least complicated of the types of testaments found under Louisiana law. It is the only Louisiana testament that non-Louisiana attorneys should attempt to draft or execute. A statutory will may be executed by any person who can read, can sign his or her name, and is otherwise competent to execute a testament. The testator must sign and date the will in the presence of two witnesses and a notary, all of whom also must sign and date the will. The testator must sign on each page and at the end of the will. The witnesses need only sign at the end of the will.[88] At the end of the testament the drafter should insert the following attestation clause:

> The testator has signed the will at the end and on each other separate page, and has declared or signified in our presence that it is his last will and testament, and in the presence of the testator and each other we have hereunto subscribed our names this ___ day of _____, 19__.[89]

Attorneys must take care to insert this attestation clause *verbatim*. In the past, several Louisiana courts have struck down statutory testaments that had deviations in the language of the attestation clauses.

The Civil Code extends a special benefit to military personnel. A service member may execute a will while in the field, provided that he or she executes it before a commissioned officer and two witnesses. If the testator is ill or wounded, a physician can replace the commissioned officer. The testament need only be written and signed by the witnesses, the testator, and the doctor or officer. The testament, however, will become void six months after the soldier returns from the field and has the opportunity to execute a testament that conforms to the ordinary forms.[90]

A testator may revoke a testament by destroying the original document at any time before his or her death.[91] To destroy only a copy without destroying the original testament, however, will not invalidate the testament.[92] Alternatively, a testator may revoke a testament by executing a subsequent testament. A second testament, however, will invalidate only those provisions in the first testament that are incompatible with, or contrary to, the provisions of the new testament.[93] Accordingly, if by drafting a new will a testator actually intends to revoke all previous wills and codicils, the new document should declare this intention expressly.

Sale or alienation of a bequeathed item,[94] or the death of a named legatee of a specific item,[95] voids the bequest. In the latter case, the item falls into the testator's residual estate. A testament normally is revoked in its entirety if a legitimate child subsequently is born to the testator or if the testator subsequently adopts or legitimates a child not mentioned in the will. The testator, however, can prevent this invalidation by providing in the will for subsequently born, adopted, or legitimated children, or by expressly declaring in the will that the subsequent birth, adoption, or legitimation of any child will not invalidate the will.[96] The safest practice for the testator is to reserve forced shares for any children born to or adopted by him or her thereafter. Without this provision, the entire testament may become null and void upon the birth or adoption of a child.

A testator need not identify specifically the property that he or she wishes to bequeath. The testator may declare simply that he or she intends to give whatever property he or she may own when he or she dies to a particular person or persons.[97] Specific bequests, however, are permissible. They are known under Louisiana law as "particular legacies" or "legacies under particular title."[98] No specialized formality is needed to grant a particular legacy. The Code requires only that the testator specifically name the item and particular legatee, and that he or she ensure that the item is not so valuable as to impinge upon the *legitime*.

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[86] La. Civ. Code Ann. art. 1591 (West 1987).

[87] *Id.* art. 1576.

[88] La. Rev. Stat. Ann. § 9:2442 (West Supp. 1991).

[89] *Id.*

[90] La. Civ. Code Ann. arts. 1597-1600 (West 1987).

[91] *Id.* art. 1690; *see also* Succession of Moran, 522 So. 2d 1174 (La. Ct. App.), *rev'd and vacated*, 535 So. 2d 369 (La. 1988).

[92] La. Civ. Code Ann. art. 1692 (West 1987); *see also In re* Succession of Talbot, 516 So. 2d 431 (La. Ct. App. 1987), *rev'd*, 530 So. 2d 1132 (La. 1988).

[93] La. Civ. Code Ann. art. 1693 (West 1987).

[94] *Id.* art. 1695.

[95] *Id.* art. 1697.

[96] *Id.* art. 1705; *see also* Succession of Austin, 527 So. 2d 483 (La. Ct. App.), *writ denied*, 532 So. 2d 135 (La. 1988).

[97] *See* La. Civ. Code Ann. arts. 1718, 1721 (West 1987).

[98] *Id.* art. 1625.

Executors and Guardians

Like most other states, Louisiana permits a testator to appoint an executor in his or her will. Articles 1658-1680 of the Civil Code provide that a testamentary executor must be at least eighteen years old[99] and that the position of executor is not heritable.[100] The Code does not preclude a testator from naming a spouse, child, or other heir or legatee to fill the position, so long as the executor has reached the age of majority.

The executor's basic duties are to oversee the opening of the succession and to ensure that the testament is faithfully executed.[101] Upon the testator's death, the executor first must pay the testator's just debts from the estate. He or she then must ensure that any specific bequests are removed from the estate and given to the particular legatees. The executor also must assess the net worth of the estate and ensure that the *legitime* of any forced heir is not impinged upon by any disposition contained in the testament.

The issue of guardianship of minors under Louisiana law is a bit more complicated. The role of guardian is played by one who, under the Civil Code, is called a "tutor" rather than a guardian. The Code describes several different types of tutorships, including tutorship by nature, by will, by effect of the law, and by judicial appointment.[102] For our purposes, the most important types of tutorship are tutorship by nature and tutorship by will.

Upon the death of either parent, the tutorships of minor children vest automatically in the surviving parent.[103] If a child is illegitimate, the mother normally will be the tutrix of the child. If the mother dies and the natural father has acknowledged the child, he may claim tutorship by law. If, however, the child's father fails to acknowledge the child as his own before the death of the child's mother, the court may grant tutorship to the mother's parents or siblings.[104] A child's surviving parent may appoint a tutor for the child in a last will and testament.[105] If a child's parents are divorced or legally separated, only the custodial parent may appoint a testamentary tutor.[106]

To protect the child when a tutor is appointed, the Code requires that a legal mortgage in favor of the child be recorded on all immovable property belonging to the tutor.[107] The tutor, in turn, gains authority over the person and the property of the minor child. Louisiana also has enacted the Uniform Transfers to Minors Act,[108] which may enhance a tutor's authority to manage the financial interests of his or her minor charges.

Living Wills

Louisiana recognizes the right of an individual to instruct his or her physicians to withhold or withdraw life sustaining procedures if he or she is diagnosed as suffering from a terminal or irreversible condition.[109] This intent should be expressed in a declaration that is signed by the declarant and two witnesses. The Code does not require a notary public to sign the document. Alternatively, a declarant may announce his or her intent in an oral or nonverbal declaration before two witnesses at any time following the diagnosis of a terminal and irreversible condition.[110]

Conclusion

The Civil Code is, by no means, impossible for a non-Louisiana attorney to understand and use. A judge advocate should be able to draft wills and testaments for Louisiana residents, and to advise them in the wise and prudent administrations of their estates. Captain Hanchey, U.S. Army Trial Defense Service, Region III, Fort Carson, Colorado.

Legal Assistance Technology Note

LAAWS Special Features

As a result of Operations Desert Shield and Desert Storm almost every Army judge advocate knows that the Legal Automation Army-Wide System (LAAWS)[111]

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[99] *Id.* arts. 1663, 1665.

[100] *Id.* art. 1680.

[101] *Id.* art. 1672.

[102] La. Civ. Code Ann. art. 247 (West 1952).

[103] La. Civ. Code Ann. art. 250 (West Supp. 1991).

[104] *Id.* art. 256.

[105] *Id.* art. 257.

[106] *Id.* art. 258.

[107] *Id.* art. 322.

[108] La. Rev. Stat. Ann. § 9:755 (West Supp. 1990).

[109] La. Rev. Stat. Ann. § 40:1299.58.1 (West Supp. 1991).

[110] La. Rev. Stat. Ann. § 40:1299.58.3 (West Supp. 1990).

[111] The Legal Automation Army-Wide System (LAAWS) is The Judge Advocate General's Corps' dedicated automated system. Integrating legal services into a standard system, it provides automated legal services down to battalion level. Dep't of Army, Field Manual 27-100, Legal Operations, para. 6-6*a* (3 Sept. 1991). Ultimately, LAAWS will include modules for all functional areas of the law.

legal assistance module (LAM) contains an automated document assembly system that legal assistance attorneys can use to prepare wills and powers of attorney.[112] LAAWS-LAM contains two other features that also may be of special interest to legal assistance attorneys and their supervisors: a word processing applications program and a client card tracking system.[113]

Word Processing Applications

The LAAWS-LAM word processing applications (WPA) allow users quickly and easily to compose formal and informal memoranda, endorsements, and letters. Input menus prompt the typist to enter the information the program requires for the initial document layout. After the typist has entered this data, the program formats the document, entering appropriate heading information for the correspondence selected. The typist then composes the body of the document using standard word processing.[114] After the typist completes and spell checks the document,[115] he or she should press <ALT> and <F9> simultaneously, then <F9>, to view the next word processing function menu. The typist then may return to the current document, save or print the document, or exit the WPA.

Client Card Tracking System

Another LAAWS-LAM special feature is the client card system (CCS). The CCS is a menu driven system for the collection of information concerning clients and legal assistance activities. Legal assistance personnel may use this system to perform the following tasks:

- collect information concerning legal assistance office visits;
- produce a monthly or a yearly legal assistance operations report;
- transfer reports to the Chief, Army Legal Assistance, in electronic format; and
- produce a variety of management reports concerning the local legal assistance office (LAO).

A legal assistance office that does not use the CCS to record client information still may use the system to generate monthly or yearly operations reports simply by entering the appropriate statistics. If the office uses the CCS to track client appointments, the system will generate the monthly and yearly reports automatically, using the information stored in the computer.

A legal assistance office also may prepare other management reports if it uses CSS to store client appointment information. These reports may include the names of clients seen by the office,[116] the clients seen by each attorney,[117] and the number of clients the office has seen for various issues.

Depending upon the computer equipment and the configuration of the office, the use of the LAAWS-LAM WPA and CCS programs may save legal assistance personnel both time and effort. The LAAWS-LAM Users Reference Manual contains more detailed instructions for both systems. Lieutenant Colonel Van Hooser & Major Hancock.

Family Law Note

Using Garnishment to Collect Alimony and Child Support

Family law practitioners may use garnishment to recover child support or alimony arrearages or to enforce a current support obligation, as permitted under state law and ordered by a court. Garnishment of the wages of nonfederal employees and retirees is governed entirely by state law.

The Social Security Amendments of 1974 included a limited waiver of the federal government's sovereign immunity against state garnishment actions. Consequently, a state court may garnish "moneys due" from the federal government to a current or retired federal employee to satisfy the employee's alimony and child support obligations.[118] Military active duty, Reserve, and retired pay fall within the definition of "moneys due,"[119] but veterans' benefits for service-connected disabilities generally are exempt from garnishment.[120] A state court,

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[112] *Cf.* Memorandum, HQ, Dep't of Army, DAJA-LA, 1 Oct. 1990, subject: Fill-in-the-Blank Will Formats (stating, "TJAG Policy Memorandum 89-3, dated 21 June 1989, sets the policy that the LAAWS [will] program is the JAG Corps standard").

[113] *See* Legal Assistance Branch, Administrative Law Division, The Judge Advocate General's School, U.S. Army, The LAAWS 003.1 User's Reference Manual, Legal Assistance Module, chs. 6-7 (Jan. 1991) (providing more detail on using these features) [hereinafter LAAWS Deskbook]. The LAAWS Deskbook was included on the diskettes on which the Army distributed LAAWS.

[114] *See generally id.* ch. 6 (providing more detailed user instructions on the WPA, including views of the menu screens).

[115] Spell checking in ENABLE is accomplished by pressing <F10>, then <2>.

[116] This report produces a list of the type of legal assistance visits made by soldiers from the selected unit.

[117] This report lists the clients seen by a specified legal assistance provider or by all legal assistance providers.

[118] *See* 42 U.S.C. §§ 659-662 (1988).

[119] *Id.* § 662(f).

[120] *Id.* § 662 (f)(2) (1988). *But see* 5 C.F.R. § 581.103 (1990). If a recipient is a military retiree who is receiving military retired pay and VA disability compensation, then the amount of veterans disability compensation that he or she receives *in lieu of* regular military retired pay is subject to garnishment unless the retiree waived all retired pay. *Id.* If the retiree waives all retired pay, however, none of the disability compensation is subject to garnishment. *Id.*

however, may consider disability benefits as income when determining the correct amount of a retiree's child support obligation.[121]

The amount of federal pay that is subject to garnishment may be reduced by certain withholdings, the most significant being income tax withholdings.[122] In addition, allowances are completely exempt from garnishment.[123]

State laws generally limit the percentage of "net" pay that may be garnished. Moreover, a federal garnishment ceiling contained in the Consumer Credit Protection Act (CCPA)[124] specifically limits state discretion in that area.[125] Under the CCPA, courts may not subject obligors that support family members, other than those to whom the garnishment order relates, to garnishment of more than fifty percent of their net pay.[126] Obligors with no other family members to support may have sixty percent of their pay garnished.[127] A court may garnish an additional five percent of an obligor's net pay, however, if the obligor owes more than twelve weeks of arrearages.[128]

Procedures for garnishing a soldier's pay are relatively simple. Initially, the support obligee must obtain a garnishment order from the appropriate state court, naming the federal agency that employs the obligor as garnishee.[129] The garnishment order then must be served on the agency's designated service of process agent by registered or certified mail, together with a certified copy of the underlying support order.[130] Either the garnishment order, or correspondence accompanying the order, should include the obligor's full name, status (*i.e.* active duty, civilian, or retiree), and social security number.[131]

Defenses to garnishment are limited. Attorneys must advise their clients that a military finance center invariably will honor garnishment orders unless: (1) the garnishment is for an impermissible purpose; (2) the court that issued the garnishment order failed to comply with the requirements of 5 C.F.R. part 581;[132] or (3) the obligor can demonstrate that subsequent litigation enjoined the garnishment or overturned the underlying support order.[133]

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[121] *See* Rose v. Rose, 107 S. Ct. 2029 (1987).

[122] 42 U.S.C. § 662(g) (1988). The obligor, however must justify separately each withholding for taxes that exceeds the amount required based on the number of personal exemptions he or she has claimed. *Id.* § 662(g)(3). This requirement helps prevent dishonest obligors from manipulating the amounts of their pay that are subject to garnishment.

[123] 5 C.F.R. § 581.104(h)(2) (1990). These allowances include basic allowance for quarters (BAQ), basic allowance for subsistence (BAS), and variable housing allowance (VHA). *See id.*

[124] Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1613-1692*o* (1988)).

[125] 15 U.S.C. § 1673 (1988).

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] 5 C.F.R. § 581.202(a) (1990).

[130] *Id.* § 581.202(b). The designated agents, and their addresses, for the military services and Coast Guard are:

Army:
Defense Finance & Accounting Service
Indianapolis Center
ATTN: DFAS-I-GGIndianapolis, IN 46249
(317) 542-2155

Air Force:
Defense Finance & Accounting Service
Denver Center
ATTN: GL
Denver, CO 80279
(303) 676-7524

Marine Corps:
Director
Defense Finance & Accounting Service
Kansas City Center
Kansas City, MO 64197
(816) 926-7103

Navy:
Director, Navy Family Allowance Activity
Anthony J. Celebrezze Federal Bldg.
Cleveland, OH 44199
(216) 522-5301

Coast Guard:
Commanding Officer (L)
U.S. Coast Guard Pay and Personnel Center
Federal Building
444 S.E. Quincy Street
Topeka, KS 66683-3591
(913) 295-2984

Note that the designated agent may be different for garnishment of Department of Defense civilian pay. For a complete listing of all designated agents in the federal government, see *id.* part 581, app. A.

[131] *Id.* § 581.203.

[132] *E.g.*, *id.* § 581.202 (establishing procedures for service of process); *id.* § 581.203 (setting forth information that must accompany process).

[133] *Id.* § 581.305.

Garnishment requires time-consuming separate court proceedings. Moreover, in comparison to an involuntary allotment,[134] the amount of an obligor's income that may be attached through garnishment is limited. As a result, garnishment usually is not the support enforcement mechanism of choice for use against soldiers. Garnishment, however, is worth considering as an enforcement mechanism against *non*military, noncustodial parents. This is particularly true if the state in which the noncustodial parent resides has adopted a restrictive definition of the term "wages" for purposes of implementing wage withholding. Major Connor.

Consumer Law Note

Pay Cash or Finance A Car? Be Wary When the Computer Says, "Finance!"

This is the computer age and many car dealers are joining in the silicon era by using software packages to show consumers that financing a car is less costly than paying cash. Common sense, of course, suggests that this is absurd. The computer programs, however, convincingly suggest to consumers that they could put their cash in a certificate of deposit or other investment tool at an interest rate that appears to be higher than the loan rate on the car.

The Federal Trade Commission (FTC) describes many of these programs as unfair and deceptive. It found that the programs commonly misrepresent the "net differences" on their displays as the amount a consumer actually would save if he or she financed his or her purchase, rather than redeeming investment certificates for cash payment.[135]

In a proposed consent agreement with the FTC, Automatic Data Processing, Inc., promised to prepare and send to their clients a letter substantially as follows:

> We have agreed with the Federal Trade Commission to stop selling or supplying you "with the "Cash Comparison" screen and printout in our ... software. According to the FTC, use of the screen and printout conveys the erroneous impression that a consumer will save money by financing or arranging for financing rather than paying cash. The FTC alleges that, because the consumer will not save money by financing, this representation is false and misleading and a violation of the Federal Trade Commission Act .... You should be aware that the FTC has taken the position that the use of any such comparison, whether manually created or computer generated, may be deceptive and misleading and a violation of federal law."

Computer generated information can be very persuasive to unwary buyers. As part of the installation preventive law program, legal assistance attorneys should caution the military community if local automobile dealers are using similar computer comparisons. Major Hostetter.

Estate Planning Note

Note from the Field: Attestation of New York Wills

Consistent with long-standing will execution practice, attorneys commonly have testators sign or initial each page of their wills.[136] This practice, however, could create probate problems if the testator is a New York domiciliary. In 1951, New York's highest court affirmed the New York Surrogate's Court's denial of probate of a will because the paragraph in which the testator had named the executors appeared below the testator's signature.[137] The high court gave no effect whatsoever to any part of the will.[138] The state legislature later "ameliorated" this draconian decision by enacting Estates, Powers and Trusts Law § 3.21. In addition to other formalities, this statute requires a testator to sign the will "at the end thereof."[139] New York courts generally have been extraordinarily strict in applying this requirement. If any matter that is essential to the construction of the will follows the testator's signature, the will very well may be invalid. Simply stated, the testator's signature marks the "end of the will"—the point at which the New York courts literally will read no further.

A 1984 Surrogate's Court decision[140] raised the malpractice stakes another notch. The attorney who drafted a will accidentally reversed pages three and four when the will was stapled together. The testator's signature on page four marked the end of the will. Although the attorney's testimony, page numbering, and the logical

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[134] In particular, the involuntary or mandatory allotment often allows an obligee to attach the obligors' military base pay plus BAQ and BAS in cases in which the obligor is a soldier in the grade of E-7 or above. *See* 32 C.F.R. Part 54 (1990).

[135] 56 Fed. Reg. 46,187 (1991).

[136] Actually, every LAAWS-generated will includes a line for the testator's signature at the bottom of each page unless the drafter affirmatively modifies the document.

[137] Will of Winters, 302 N.Y. 666 (1951).

[138] *Id.*

[139] N.Y. Est. Powers & Trusts Law § 3-2.1(a)(1) (1981). The section further declares, "No effect shall be given to any matter, other that the attestation clause, which follows the signature of the testator...." *Id.* § 3-2.1(a)(1)(B).

[140] Estate of Mergenthaler, 474 N.Y.S.2d 253 (Surr. Ct. 1984).

sequencing of the paragraphs clearly indicated that the pages unintentionally had been transposed, the court held that page three would be given no effect because it followed the testator's signature on page four.

Legal assistance attorneys should exhibit caution when supervising the execution of wills by New York domiciliaries. In particular, having a New York testator sign each page of his or her will could prove problematic and is a practice best avoided.[141] Major Shultz.[142]

Tax Note

Social Security Numbers for Dependents

In tax year 1990, the Internal Revenue Service (IRS) required taxpayers to include their dependents' social security numbers on their tax returns if these dependents were at least two years old by the end of the tax year for which the returns were being filed.[143] Beginning with tax year 1991, however, a taxpayer must list a dependent's social security number if the dependent will be at least one year old by the end of the tax year.[144]

To obtain a social security number for a dependent, the taxpayer must file a Form SS-5 with the Social Security Office for the region in which the dependent lives. Legal assistance attorneys should publicize this information as soon as possible and should have Form SS-5 available for clients.[145] Major Hancock.

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[141] *See In re* Parkman's Estate, 156 N.Y.S. 22 (Surr. Ct. 1956). The hallmark of a good will is not that it will stand up in court, but that it is never challenged in court.

[142] Major James D. Shultz, Jr., a member of the U.S. Army Reserves, is admitted to practice in New York. He specializes in tort and personal injury, medical malpractice, and general litigation.

[143] I.R.C. § 6109(e)(2) (Maxwell MacMillan 1991).

[144] *Id., amended by* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 § 11,112(a), 1990 U.S.C.C.A.N. 1046-47.

[145] Form SS-5 may be obtained from a local Social Security office or from the Social Security Administration by calling (800) 772-1213.

Claims Report

United States Army Claims Service

Foreign Claims Note

Maneuver Damage Control in Operation Team Spirit

Nearly half of all status of forces agreement (SOFA) foreign claims generated by United States Forces Korea (USFK) occur during the annual joint United States-Republic of Korea (ROK) Team Spirit exercise. The United States Armed Forces Claim Service, Korea (USAFCS-K), places great emphasis on field investigations of maneuver damage during that operation.

During Team Spirit, USAFCS-K operates a Maneuver Damage Control Center (MDCC), centrally located within the maneuver area and supported by as many as three mobile investigative teams. Each investigative team consists of an Army legal representative—that is, a civilian claims attorney, an Army judge advocate, or a claims noncommissioned officer—and a United States Korean employee, who serves as claims investigator and translator. A bilingual staff also operates from the MDCC, which maintains communications with USFK headquarters, the MDCC mobile teams, all Army field units, and all Korean Government offices supporting Team Spirit maneuver damage investigations.

Every day, the mobile teams collect maneuver damage incident reports from major field units—usually through the G5 and staff judge advocate field offices of each corps or division participating in the exercise. The mobile teams also contact each ROK government office at the county level within their assigned areas daily to collect information the field units may have missed.

Maneuver damage is reported on a bilingual form that is available through both United States Army and ROK Government channels. Witnesses can use this form to report maneuver damage to any Army field unit or local Korean Government office. One section of this form is reserved for use by USFK personnel only. Completion of this section means that an incident is "pre-verified"—meaning that claims personnel probably need to conduct no further investigation of small claims arising from the incident.

The MDCC serves as a focal point for the collecting and processing of maneuver damage information during Team Spirit. It consolidates damage reports, then matches the grid coordinates with Korean locations for each incident to detect and resolve duplicate reporting of damage. Computer processing of damage reports enables the MDCC to provide USFK headquarters with daily updates on the type and amount of maneuver damage and to dispatch the mobile teams to areas where maneuver damage is most extensive, or to locations where Korean Government officials specifically request a mobile team be sent.

Because every unit of battalion size or larger that participates in the exercise has its own claims officer, virtually every maneuver damage incident will be investigated by USFK personnel. Two of the three mobile teams of the MDCC remain on duty for approximately two weeks after the exercise ends to finish collecting and investigating incidents that occurred around the close of the operation.

Historically, the ROK Government has adjudicated claims at or near the amount claimed. Investigation during the exercise now permits USAFCS-K investigators to discuss the amount of the claim with local government leaders and claimants, effectively reducing the amount paid to one-third to one-half of the sum originally claimed. Although quantifying the exact savings these investigations produce is difficult, one conservative estimate holds that USAFCS-K's participation in the annual Team Spirit field exercise saves the United States Government from one million to 1.5 million dollars per year in foreign claims expenditures. Mr. Richards, Chief, Foreign Claims Division, USAFCS-K.

Household Goods Recovery Note

Carriers File Suits Against United States

Fourteen household goods carriers, represented by a Washington, D.C., law firm, have filed twenty law suits against the federal government in the United States Claims Court. These suits allege that the military services used nonmeritorious loss and damage claims to offset transportation charges that the government owed the carriers for later, unrelated moves. The carriers are demanding nearly $200,000 in damages.

The twenty suits encompass over 180 individual loss and damage claims originally filed with the Army, Air Force, and Navy under the Personnel Claims Act. The Army accounts for sixty-two of these claims. Each suit involves claims of at least two military services. Many suits also name several different carriers as joint plaintiffs.

In general, the vast majority of carrier recovery claims are settled when the carrier either pays the amount the government has demanded or negotiates a reduced amount. If the parties reach an impasse, the military services send the claim to their respective finance centers—for the Army and Air Force this is the Defense Finance and Accounting Center in Indianapolis, Indiana—which offset the carriers' debts against bills currently submitted by the carriers. A carrier may appeal this action to the United States General Accounting Office (GAO) for a final determination of the amount of liability. For the claims involved in the suits, however, the plaintiffs apparently decided to forego GAO appeal procedures.

The Government asserts that its ability as a creditor to offset prior debts against current amounts owed is well established as a matter of law. It notes that the Supreme Court recognized this principle in *United States v. Munsey Trust Co. of Washington, D.C.*, 332 U.S. 234 (1947), which the Court of Claims later applied to a carrier for loss and damage claims in *IMP Freight, Inc. v. United States*, 639 F.2d 676 (Ct. Cl. 1980). The Government also contends that a carrier is liable for loss and damage unless it can prove that the loss and damage resulted from one of the causes enumerated in *Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U.S. 134 (1964) (*e.g.*, inherent vice, act of God, public enemy). It claims that once it has established a prima facie case by proving (1) that goods were in good condition when the owner turned them over to a carrier; (2) that the goods were lost in transit or arrived in a damaged condition; and (3) the actual measure of damages, the burden shifts to the carrier to show that this loss or damage did not result from the carrier's failure to exercise reasonable care to protect the goods. *See Johnson Motor Transp. v. United States*, 149 F. Supp 175, 179-80 (Ct. Cl. 1957).

The Government intends to establish its prima facie case through the documents that it regularly used to process each claim—that is, with government bills of lading, preshipment inventories, Department of Defense (DD) Forms 1840 and 1840R (describing the extent of loss or damage), and DD Forms 1844 (describing the property affected, the cost of repairs or replacements, and the amounts allowed in compensation). The Government also expects to introduce expert testimony regarding carrier contracting procedures and liability, personnel claims adjudications, and carrier liability calculations.

Although carriers have sued the federal government in a number of reported cases for offsetting damages to previously transported government property, carrier suits involving offsets for personnel claims appear unprecedented. No trial date has been set for any of these actions. As these cases progress, the Claims Service will submit updates to *The Army Lawyer*. For now, claims personnel may derive a valuable lesson from this litigation. That the government now must defend personnel claims adjudications and carrier liability calculations in court demonstrates the continuing need for all claims personnel to ensure that claims files are well documented and well prepared. Mr. Ganton.

Affirmative Claims Note

Fiscal Year 1992 OMB Hospital Rates

The Office of Management and Budget (OMB) has established the following hospital rates for use in computing medical care costs for treatment provided in fiscal year (FY) 1992:

Inpatient care — $701 per day
Outpatient care — $76 per visit
Burn Center care — $2347 per day

These rates appear at 56 Fed. Reg. 5194 (1991). They are effective for all care provided by military medical

facilities after 1 October 1991. The federal government, however, still must base Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) hospital costs on diagnosis related groups (DRGs) rather than on the OMB rates. Captain Dillenseger.

Management Note

Delegation of Authority to Settle Claims at Womack Army Medical Center

Authority is granted effective 1 October 1991, to establish a separate claims office at Womack Army Medical Center (WAMC). In accordance with Army Regulation 27-20, Legal Services: Claims, paras. 3-14*e*, 4-12*c* (28 Feb. 1990) [hereinafter AR 27-20] WAMC is assigned office code 302 and is authorized to compromise and pay claims under the Military Claims Act and the Federal Tort Claims Act. This authority is limited to tort claims arising within WAMC. The Staff Judge Advocate, XVIII Airborne Corps, will remain responsible for settlement of claims by WAMC personnel processed under AR 27-20, chapter 11, as well as medical care recovery and other affirmative claims. Colonel Fowler.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office and TJAGSA Administrative and Civil Law Division

Equal Employment Opportunity Law

Abandonment of Administrative Remedies Is Not Exhaustion

In *Vinieratos v. Department of the Air Force* Ex Rel. *Aldridge*[1] the Ninth Circuit Court of Appeals sorted out the interplay between the administrative complaint procedures of the Equal Employment Opportunity Commission (EEOC), the Merit Systems Protection Board (MSPB or Board), and the internal grievance system of the United States Air Force as well as their degree of overlap and exclusivity. It also analyzed the role of exhaustion of administrative remedies as a prerequisite for judicial review.

Vinieratos, the appellant, worked as a program planning engineer at Vandenberg Air Force Base. Because he claimed to suffer from a "stress related condition," the Air Force had accommodated him for several years with a flexible schedule, minimal supervision, and a smoke-free environment.[2] When Vinieratos' Air Force supervisor ended this accommodation in 1987, Vinieratos filed an equal employment opportunity (EEO) complaint with the installation EEO officer, alleging discrimination based on his handicap.[3] While that complaint was still pending, Vinieratos made additional complaints and filed an informal grievance under the Air Force's grievance procedure.[4] Before his removal, Vinieratos also made two formal EEO complaints and filed several other grievances.[5] When the Air Force finally removed Vinieratos from his position, it notified him that he could appeal either to the Merit Systems Protection Board or through negotiated grievance procedure, and warned him that he could not do both.[6] Vinieratos chose to appeal to the MSPB.[7]

At first, Vinieratos indicated through his attorney that he wanted to combine all of his complaints in his MSPB appeal. He later made another formal EEO complaint and filed a motion asking the MSPB administrative judge (AJ) to defer action on his appeal "'so that the removal could be reviewed through the EEO complaint process.'"[8] The AJ complied, summarily dismissing Vinieratos' appeal without prejudice.[9] Almost simultaneously, however, the Air Force's director of civilian personnel dismissed Vinieratos' two outstanding EEO complaints, asserting that under applicable federal regulations Vinieratos irrevocably had elected to pursue relief through the MSPB.[10] Vinieratos responded by filing two nearly identical complaints in federal district court. The court consolidated these suits and ultimately dismissed them, holding that because Vinieratos had

[1] 939 F.2d 762 (9th Cir. 1991).

[2] *Id.* at 765.

[3] *Id.*

[4] *Id.* at 765-66.

[5] *Id.* at 766.

[6] *Id.*

[7] *Id.*

[8] *Id.* (quoting Appellant's Motion for Deferral of Jurisdiction, Vinieratos v. Department of the Air Force, No. SF07528810384 (M.S.P.B. May 6, 1988) (unpub.)).

[9] *Id.* at 766.

[10] *Id. See generally* 29 C.F.R. 1613.403 to .406 (1990).

failed to exhaust available administrative remedies before filing suit, the court lacked subject matter jurisdiction under title VII of the Civil Rights Act[11] to hear the cases.[12]

On appeal, the Ninth Circuit observed that the exhaustion of administrative remedies is a statutory precondition to a suit under title VII. It noted that whether a plaintiff actually has satisfied this precondition is a question of law that is reviewable de novo.[13] The court therefore decided to treat the district court's dismissal for lack of jurisdiction—and, more specifically, its conclusion that appellant had failed to exhaust his administrative remedies—as a legal determination subject to de novo review.[14]

The Ninth Circuit also noted that the methods by which Vinieratos, a federal employee with exclusive union representation, could challenge an adverse government personnel action are governed by the Federal Labor-Management Relations Act (FLMRA).[15] The FLMRA expressly requires a federal employee that alleges employment discrimination to elect to pursue a remedy under either a statutory procedure or under a union-assisted negotiated grievance procedure.[16] The employee cannot pursue both avenues; moreover, his or her election, once made, is irrevocable.[17] Accordingly, the court concluded that Vinieratos irrevocably had elected to adjudicate his claims through the statutory EEO procedure. His abandonment of that process to pursue another avenue of relief amounted to a failure to exhaust the one appropriate administrative remedy that was available to him.[18] The court found further that Vinieratos not only had abandoned the EEO process that he irrevocably had elected, but also had obstructed it willfully by switching repeatedly from one process to another, alternately initiating new proceedings and deferring to previously selected procedures.[19] The court acknowledged that, viewed in isolation, none of appellant's acts would suggest conclusively that he had abandoned his original EEO election, but stated that the overall pattern of his conduct clearly implied abandonment.[20]

Vinieratos, in the court's estimation, had sought to pursue as many avenues of relief as possible, hoping to stay proceedings in one forum whenever the prospect for relief appeared brighter in another.[21] The Ninth Circuit, therefore, found that the district court had applied the administrative exhaustion requirements of title VII correctly to this situation because the appellant, through his erratic and disruptive behavior, manifestly had "fail[ed] to exhaust his chosen remedy and thereby [had] foreclosed judicial review."[22]

One lesson that a labor counselor may derive from *Vinieratos* is that he or she should monitor closely any complaint in which an employee seeks redress for the same perceived wrong through a variety of forums. In the military workplace, a complainant may pursue separate actions based on the same complaint through an EEO officer; the inspector general's office; the Office of Special Counsel; agency or union grievance procedures; an MSPB appeal; or a letter to a member of Congress, the Secretary of Defense, the Army Chief of Staff, the Secretary of the Army, or even the President. A labor counselor should seek to channel complaints to the most appropriate forum and to prevent employees from reargueing old cases in new forums whenever they do not like the results of their first litigations.

Civilian Personnel Law

MSPB Appeal Does Not Constitute Whistleblowing

In *Ruffin v. Department of the Army*[23] the Army removed the appellant from his position of management analyst at Fort Monroe, Virginia, on January 19, 1989. Ruffin appealed to the MSPB, claiming that the Army had removed him for disclosing information to the Training and Doctrine Command (TRADOC) inspector general (IG) about an alleged racial incident. The Board dis-

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[11] Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, *amended by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 § 11, 86 Stat. 103, 111 (adding section 717) (codified as amended at 42 U.S.C. § 2000e-16 (1988)).

[12] *Vinieratos*, 939 F.2d at 767.

[13] *Id.* at 767-68 (citing Mahoney v. United States Postal Serv., 884 F.2d 1194, 1196 (9th Cir. 1989)).

[14] *Id.* at 768.

[15] *Id.* (citing 5 U.S.C. § 7101-7135 (1988)).

[16] *Id.* at 768 (citing 5 U.S.C. § 7121(d) (1988)).

[17] *Id.*

[18] *Id.*; *see also Smith v. Kaldor*, 869 F.2d 999, 1003-04 (6th Cir. 1989); *Jones v. Department of Health and Human Serv.*, 622 F. Supp. 829, 831-32 (N.D. Ill. 1985).

[19] *Vinieratos*, 939 F.2d at 770.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 772; *see also* Rivera v. United States Postal Serv., 830 F.2d 1037 (9th Cir. 1987), *cert. denied*, 486 U.S. 1009 (1988).

[23] 48 M.S.P.R. 74 (1991).

missed this appeal in March 1989 pursuant to a settlement agreement in which the Army agreed to cancel the removal and in which Ruffin agreed to resign.

Later that year, Ruffin applied for a position as a transportation specialist with the Transportation Engineering Agency (TEA) at Fort Eustis. Agency officials initially considered Ruffin's application favorably, but ultimately decide not to hire him after they learned that he had resigned pending removal for cause. Ruffin responded by filing an individual right of action (IRA) appeal. In this appeal, he claimed that his nonselection for the TEA position had resulted from his earlier appeal to the Board and from his disclosures to the TRADOC IG.

The Board reviewed Ruffin's appeal in light of its earlier decision in *Williams v. Department of Defense*,[24] in which it had held that the filing of an EEO complaint cannot form the basis for an IRA.[25] The Board concluded that the filing of an appeal with the Board, like the filing of an EEO complaint, is not a protected disclosure under the Whistleblower Protection Act[26] and, therefore, will not support an IRA appeal.[27]

Turning to Ruffin's disclosure to the inspector general, the MSPB implicitly acknowledged that this sort of communication is protected by the Act.[28] In the instant case, however, the Board noted that Ruffin had presented no evidence that TEA officials were aware of his revelations to the IG when they rejected his application.[29] Accordingly, it ruled that he had failed to show by a preponderance of the evidence that his protected disclosure at Fort Monroe actually had contributed to his subsequent removal.[30]

Nonrenewal of Temporary Appointment Covered Under the Whistleblower Protection Act

In *Kern v. Department of Agriculture*[31] an employee filed an IRA contending that the Department of Agriculture had failed to renew his temporary appointment or to grant him a sustained superior performance award in reprisal for his making protected disclosures. In a prehearing order, the AJ ruled that allowing a temporary appointment to expire was not a "personnel action."[32] At the appellant's request, the AJ certified his ruling for interlocutory review and dismissed the remaining issue without prejudice.[33]

On review, the Board reversed the AJ's ruling. It noted that the Whistleblower Protection Act declares that an agency may not "take *or fail to take* ... a personnel action with respect to any employee or applicant for employment" because that individual had made protected disclosures.[34] The Board held that, although the actual expiration of a temporary appointment is not an action, the agency's failure to take a personnel action—that is, to extend the appellant's appointment—was indeed a "personnel action" within the definition of the Act.[35]

Back-Pay Awards Subject to Garnishment

In *Morones v. Department of Justice*[36] the appellant and the agency had entered into a settlement agreement which provided, in part, that the agency would issue the appellant a check for back pay no later than sixty days after it received the appellant's interim earnings statement.[37] The agency received the earnings statement on or about November 21, 1988.[38] On January 18, 1989, however, the agency also received a court order seeking to garnish $52,262.37 from the appellant's salary to satisfy arrearages of child and spousal support.[39] After legal review, the agency advised the appellant of the garnishment on March 7, 1989. It also informed him that it intended to remit sixty percent of the total back-pay award of $56,148.96—that is, $33,689.37—to the garnishment agent in partial satisfaction of the order.[40] The appellant petitioned for enforcement of the settlement agreement. He contended that the agency's deduction was

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[24] 46 M.S.P.R. 549 (1991).

[25] *Ruffin*, 48 M.S.P.R at 78 (citing *Williams*, 46 M.S.P.R. at 554).

[26] 5 U.S.C. § 2302(b)(8) (1988).

[27] *Ruffin*, 48 M.S.P.R. at 78.

[28] *See generally id.* at 78-79.

[29] *Id.*

[30] *Id.* at 79.

[31] 48 M.S.P.R. 137 (1991).

[32] *Id.* at 139

[33] *Id.*

[34] *Id.* at 140 (citing 5 U.S.C. § 2302(b)(8) (1988))(emphasis added).

[35] *Id.* at 140-41 (citing 5 U.S.C. § 2302(a)(2)(A) (1988); Special Counsel v. Department of the Army, 48 M.S.P.R. 13, 16 (1991)).

[36] 49 M.S.P.R. 212 (1991).

[37] *Id.* at 213.

[38] *Id.* at 213 n.1.

[39] *Id.* at 214 n.2.

[40] *Id.* at 214.

improper because no federal statute or regulation specifically empowered the Department of Justice to divert all, or part of, his back-pay award to satisfy a garnishment order.[41]

The Board commented briefly on the partial waiver of federal sovereign immunity found at 42 U.S.C. § 659, noting that this statute "permits states to garnish monies due and owing to [federal] employees ... based on renumeration due and owing to those individuals" to enforce child or spousal support orders.[42] The Board then directed its attention to the statutory definition of remuneration. Title 42, U.S.C. § 662, describes renumeration as any "compensation paid or payable for personal services of ... [an] individual, whether ... [this] compensation is denominated as wages, salary, commission, bonus, pay, or otherwise, and includes but is not limited to, severance pay, sick pay, and incentive pay ...."[43] Finding that a back-pay award fairly may be described as compensation accumulated over a period of time, the Board held that the appellant's award was not excluded from garnishment.[44]

Federal Labor Relations Law

Interest on Performance Awards

The Comptroller General recently ruled that under certain circumstances an agency may pay interest to employees to whom it improperly has denied a performance award that is required under the terms of a negotiated agreement.[45] The Comptroller General reasoned that the interest provisions of the Back Pay Act[46] apply to the improper denial of a performance award if an agency, by agreeing in a collective bargaining agreement to award individuals who meet specific criteria, has negotiated away its discretion to grant awards. In this case, the agency had agreed in a national collective bargaining agreement (CBA) that it would provide employees who received certain performance ratings with an incentive award equal to at least two percent of their salaries. In addition, a union local had proposed a provision for a CBA that would require the agency to pay each performance award within ninety days after the date of the performance rating and to pay interest on late awards. The agency and the union jointly sought an opinion from the Comptroller General under 4 C.F.R. part 22 to determine whether this proposal comported with the Back Pay Act. The Comptroller General opined that, because the national agreement required the agency to pay performance awards, a requirement that the agency also pay interest on late or improperly denied awards was consistent with the Back Pay Act.

Union Attorneys' Fees at Market Rate

The United States Court of Appeals for the District of Columbia Circuit recently ruled that federal employee unions may be entitled under the Back Pay Act to attorneys' fees at the market rate.[47] In a two-to-one decision, the court held that fees are available under the Back Pay Act[48] to attorneys that are retained or employed by a labor union to represent union members in grievances and unfair labor practice complaints. Significantly, the court held that the affected employee neither need be named as a party,[49] nor be personally liable for the attorneys' fees.[50] Circuit Judge Sentelle, dissenting, protested that the Back Pay Act does not authorize payment of attorneys' fees to a union. Implying that the attorneys in the instant case actually represented the unions that employed them, Judge Sentelle noted that the Act applies only when attorney represents an employee of the federal government and that to recover under the Act, an "employee" must be an individual, not a labor organization.[51]

Practice Pointer

Last-Chance Agreements

A recent MSPB decision may provide Army labor counselors with creative options for negotiating last-chance settlement agreements. In *Hernandez v. United States Postal Service*[52] the appellant filed a petition for

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[41] *Id.*

[42] *Id.* at 215.

[43] 42 U.S.C. § 662(f) (1988).

[44] *Morones*, 49 M.S.P.R. at 215.

[45] ___ Comp. Gen. ___, B-239138 (Sept. 1991).

[46] Back Pay Act, Pub. L. No. 89-380, 80 Stat. 94 *amended by* Act of Sept. 11, 1967, Pub. Law 90-83 § 1(34)(C), 81 Stat. 195, 203 (codified as amended at 5 U.S.C. § 5596 (1988)).

[47] American Fed'n of Gov't Employees Local 3882 v. Federal Labor Relations Auth., 944 F.2d 922 (D.C. Cir. 1991).

[48] 5 U.S.C. § 5596 (1988).

[49] *American Fed'n of Gov't Employees Local 3882*, 944 F.2d. at 932.

[50] *Id.* at 932-33.

[51] *Id.* at 938 (Sentelle, J. dissenting).

[52] 49 M.S.P.R. 245 (1991).

review (PFR) from an AJ's initial decision sustaining the agency's removal of the appellant for absence without leave and for failure to abide by a settlement agreement.[53] This agreement provided, in part:

> 5. Mr. Hernandez agrees to actively participate in the Employee Assistance Program [EAP] and will authorize the EAP coordinator to submit monthly reports to management of his participation and progress in the program.
>
> ...
>
> 10. Mr. Hernandez agrees that he will otherwise conduct himself in accord [sic] with Postal Service rules and regulations, including rules and regulations related to complying with the orders of his administrative superiors.[54]

The agreement also contained a paragraph in which the appellant waived "any right to file a grievance under the applicable collective bargaining agreement, or to seek relief from such action by way of any administrative or judicial appeal or claim."[55]

The employee appealed his removal. Oddly, the agency did not assert that the agreement precluded the Board from asserting jurisdiction. The AJ, however, chose to address the issue sua sponte.[56] He found that the employee was not barred from bringing the appeal because the employee had not signed the settlement agreement.[57] In a dramatic twist, the Board then dismissed the PFR, reopened the case on its own motion, vacated the initial decision, and dismissed the appeal for lack of jurisdiction.[58]

The Board found that the AJ erred in his factual determination, noting that the appellant actually had signed the settlement agreement.[59] The Board then remarked that under its previous decision in *Walker v. Department of the Navy*,[60] the agreement would have barred appellant's appeal even if he had not performed the ministerial act of signing the agreement because the appellant's union representative had signed the agreement on his behalf.[61] Most importantly, the Board, found that the appellant's refusal to follow agency regulations, considered together with the wording of the settlement agreement, essentially deprived the Board of jurisdiction over the appeal.[62]

Labor counselors should ensure that any last-chance agreement includes not only a waiver of appeal rights, but also a general provision like that in *Hernandez*, in which the employee expressly agrees to comply with Army rules and regulations.

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[53] *Id.* at 246-47.

[54] *Id.*

[55] *Id.* at 247.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 246.

[59] *Id.* at 247.

[60] 40 M.S.P.R. 600 (1989).

[61] *Hernandez*, 49 M.S.P.R. at 247 (citing *Walker*, 40 M.S.P.R. at 603 n.2).

[62] *Id.* at 248 (citing Stewart v. United States Postal Serv., 926 F.2d 1146 (Fed. Cir. 1991).

Professional Responsibility Notes

OTJAG Standards of Conduct Office

Ethical Awareness

The recently organized Army Standards of Conduct Office will promote ethical awareness by publishing monthly professional responsibility case summaries pursuant to a suggestion made by conferees at the April 1991 Continuing Legal Education Workshop at Charlottesville, Virginia.

All attorneys are obliged to learn the rules of professional conduct applicable to their practices. The ABA Model Rules form the basis for the Army's Rules of Professional Conduct for Lawyers.[1] These rules cover all judge advocates, civilian lawyers employed by the Army for whom The Judge Advocate General is the qualifying authority, and other attorneys who practice before tribunals conducted pursuant to the Uniform Code of Mili-

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[1] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1987).

tary Justice[2] or the 1984 Manual for Courts-Martial.[3] The Judge Advocate General interprets, implements, and enforces these rules.

These summaries may serve not only as precedents for future cases, but also as training vehicles for Army lawyers, regardless of experience, as they ponder difficult issues of professional discretion. To stress education and protect privacy, neither the identity of the office, nor the subject involved will be published.

Case Summaries

Army Rule 1.3 (Diligence); Army Rule 1.4 (Communication); Army Rule 1.16 (Declining or Terminating Representation)

A trial defense counsel's assumption that a convicted client had no posttrial matters to submit was improper, when, following the client's transfer to another installation to continue confinement, the counsel began terminal leave without taking follow-up action to contact the client or to assure the client's continued representation. That the defense counsel had advised the client to write a letter to the convening authority did not offset the counsel's failure to exercise due diligence.

Posttrial Matters Not Submitted to Convening Authority

A soldier was transferred to the United States Army Correctional Brigade at Fort Riley, Kansas, fourteen days after pleading guilty at a bad conduct discharge (BCD) special court-martial to charges of writing twenty-two bad checks. After he arrived at Fort Riley, he placed a single phone call to his defense counsel's office, leaving a message in which he asked the attorney to "change BCD to active duty."

The client only vaguely remembered his defense counsel's instructions concerning posttrial matters. He recalled that he had filled out forms for his defense counsel and had authorized the counsel to send "something" home to his mother to gather information. He also claimed that he had written one letter, and had requested a chaplain's assistance, in an attempt to reach his counsel.

Convicted Soldier Not Informed of Staff Judge Advocate's Posttrial Recommendations to Convening Authority

The defense counsel apparently never shared the staff judge advocate's (SJA) posttrial recommendations to the convening authority with the convicted soldier because the soldier had been transferred to Fort Riley before the recommendations were prepared. Moreover, when the defense counsel began his own terminal leave, he left no one at his old office prepared to act on any requests from his client.

Counsel defended his decision not to contact his client, testifying that after beginning terminal leave, he had driven back to his old office to read the SJA's posttrial recommendations. He asserted that after reading the recommendations, he had concluded that he could do nothing worthwhile for the client.

On appeal, the Army Court of Military Review found that the soldier had had virtually no legal representation after his postsentence interview with the defense counsel. The court ruled that this lack of representation amounted to a violation of the soldier's rights under the Sixth Amendment. It also remarked on the absence of record evidence that the senior defense counsel or the staff judge advocate had made any effort to ensure the soldier's posttrial representation.

Professional Responsibility Decision

A preliminary screening officer, appointed pursuant to Army Regulation (AR) 27-1,[4] considered whether the defense counsel had violated Army Rules 1.3, 1.4, and 1.16. The screening officer found no evidence that the defense counsel ever had intended to withdraw or that he would not have represented the client had he, through diligence, discovered any matter of benefit to the client. His actions in reading the posttrial recommendation showed that he clearly intended to continue as counsel even while on terminal leave. Accordingly, the screening officer concluded that the defense counsel had not violated Rule 1.16. The investigation, however, revealed that the defense counsel's failure to exercise proper diligence had precluded discovery of relevant evidence. The counsel therefore received a letter of counselling, admonishing him for committing minor violations of Army Rules 1.3 and 1.4.

Army Rule 2.2(c) (Mediation); Army Rule 8.4 (Misconduct)

A legal assistance attorney's failure properly to explain his role as the "mediator" in a child custody dispute and his misleading instructions that left students in a tax class with the false impression that they could falsify tax returns constituted minor and technical acts of professional misconduct.

Mediation

A legal assistance attorney became involved as a "mediator" in a child custody dispute between two married soldiers. First, the attorney counseled the wife. Next, he edited and notarized the husband's child custody affi-

[2] 10 U.S.C. §§ 800-940 (1988) [hereinafter UCMJ].

[3] Manual for Courts-Martial, United States, 1984.

[4] Army Reg. 27-1, Judge Advocate Legal Service, para. 7-7 (15 Sept. 1989).

davit. Later, the wife consulted him when the husband did not return the child on time. Eventually, the attorney summoned the husband to his office. In the course of this interview, the attorney ordered the husband to attention when the husband became emotional. After that, the attorney had the wife execute a child custody affidavit.

The husband ultimately consulted with a second attorney, to whom he alleged that the first attorney had threatened him with nonjudicial punishment under UCMJ article 15[5] if he ever lied to his wife again; had ordered him not to remove any property from the couple's quarters; had pressured him to execute a separation agreement; and had promised to question men with whom the husband suspected his wife was having adulterous relations.

The staff judge advocate finally intervened and provided a separate attorney to each soldier.

Tax Instruction

The legal assistance attorney also had agreed to teach a tax information class for child care providers at the request of a family child care program director. He lost control of the class while attempting to answer the students' questions because he did not understand—or did not know—the standards for the "physical presence test" for foreign earned income exclusion. The attorney himself recalled the following exchange:

Q. [If I'm close] do I fudge?

A. You have to have the last twelve months outside the U.S..

Q. Should I fudge?

A. If you fudge, the odds are you will not be caught, but these are your taxes.

Four people who later were interviewed by the AR 27-1 preliminary screening officer stated that they believed that the attorney had advised class attendees to make false statements, to misrepresent facts, and otherwise to complete their income tax returns fraudulently.

When asked if providers could claim child care credits for their own children, the attorney suggested that attendees could select the name of a German national at random from the phone book and enter the name on the return as the child care provider. He said that by writing in "foreign national" in the appropriate social security number block of an income tax return, a provider could prevent subsequent tracing by the Internal Revenue Service.

The staff judge advocate remedied the attorney's improper tax advice by providing a written tax information sheet to all class attendees.

Professional Responsibility Decision

As a result of the above two instances of professional impropriety, the attorney received a letter of counseling from the Assistant Judge Advocate General for Military Law and was assigned duties away from legal assistance.

Shortly thereafter, the attorney tendered a resignation and was administratively discharged in the face of additional allegations that he: (1) had provided incorrect advice in an unrelated tax assistance class; (2) had failed to act promptly in a nonsupport matter; (3) had failed to act promptly to protect the interests of a separation and divorce client; (4) had used government equipment and facilities for a private commercial venture and had responded deceitfully when questioned about that incident; (5) had falsely stated that he was a member of a particular state bar; and (6) had defrauded his auto insurer by submitting a false theft claim. Mr. Eveland.

[5]UCMJ art. 15.

Guard and Reserve Affairs Item

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Update to 1992 Academic Year On-Site Schedule

The following, updated 1992 Academic Year Continuing Legal Education (On-Site) Training Schedule, is presented for your information.

The only change not previously reported in November's *The Army Lawyer* is a change in action officers. CPT William Hintze will replace MAJ Carazza as action officer at San Antonio, Texas. He may be reached at HQ, 90th ARCOM, ATTN: SJA, 1920 Harry Wurzbach Hwy, San Antonio, TX 78209-1598; his telephone number is (512) 221-5164. The 90th ARCOM SJA will host this On-Site.

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 92

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
13-15 Dec 91	New Orleans, LA 2d MLC/LAARNG Radisson Suites Hotel New Orleans, LA 70130	AC GO RC GO Int'l Law Int'l Law GRA Rep	 BG Compere MAJ M. Warner MAJ Addicott COL Curtis	LTC George Simno 1728 Oriole Street New Orleans, LA 70122 (504) 484-7655
4-5 Jan 92	Long Beach, CA 78th MLC Long Beach Marriott Long Beach, CA 90815	AC GO RC GO Int'l Law Ad & Civ Law GRA Rep	 BG Compere LCDR Rolph MAJ Hatch Dr. Foley	MAJ Jeffrey K. Smith 500 S. Bonita Avenue Pasadena, CA 91107 (213) 974-5961
11-12 Jan 92	Seattle, WA 6th MLC University of Washington Law School Seattle, WA 98205	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 BG Ritchie LTC Holland MAJ Emswiler LTC Hamilton	LTC Paul K. Graves 223rd JAG Det 4505 36th Avenue W. Seattle, WA 98199 (206) 281-3002
14-16 Feb 92	San Antonio, TX 90th ARCOM SJA Sheraton Gunter Hotel San Antonio, TX 78205	AC GO RC GO Crim Law Crim Law GRA Rep	 BG Ritchie MAJ Warner MAJ Cuculic Dr. Foley	CPT William Hintze HQ, 90th ARCOM 1920 Harry Wurzbach Hwy. San Antonio, TX 78209-1598 (512) 221-5164
22 Feb 92	Salt Lake City, UT UTARNG HQ, Utah National Guard 12953 S. Minuteman Drive Draper, UT 84020	AC GO RC GO Int'l Law Contract Law GRA Rep	 BG Morrison LCDR Rolph LTC Jones LTC Doll	LTC Barrie Vernon P.O. Box 1776 Draper, UT 84020-1776 (801) 524-3682
23 Feb 92	Denver, CO 116th JAG Det Fitzsimmons Army Medical Center Aurora, CO 80045-7050	AC GO RC GO Int'l Law Contract Law GRA Rep	 BG Ritchie LCDR Rolph LTC Jones MAJ Griffin	LTC Thomas G. Martin 523 N. Nevada Avenue Colorado Springs, CO 80903 (713) 578-1152
29 Feb-1 Mar 92	Presidio of San Francisco, CA 5th MLC 6th Army Conference Facility Presidio of San Francisco CA 94129	AC GO RC GO Int'l Law Ad & Civ Law GRA Rep	 BG Ritchie MAJ Myhre MAJ Bowman COL Curtis	COL David L. Schreck 50 Westwood Drive Kentfield, CA 94904 (415) 557-3030
7-8 Mar 92	Columbia, SC 120th ARCOM University of South Carolina Law School Columbia, SC 29208	AC GO RC GO Int'l Law Crim Law GRA Rep	 BG Morrison LTC Elliott LTC Leclair MAJ Griffin	MAJ Edward Hamilton South Carolina Nat'l Bank 1405 Main Street Suite 506 Columbia, SC 29226 (803) 765-3227

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
13-15 Mar 92	Kansas City, MO 89th ARCOM KCI Airport Marriott Kansas City, MO 64153	AC GO RC GO Ad & Civ Law Ad & Civ Law GRA Rep	 BG Compere COL Merck MAJ McCallum LTC Hamilton	CPT Ted Henderson HQ, 89th ARCOM 3130 George Washington Blvd. Wichita, KS 67210 (316) 681-1759
21-22 Mar 92	Washington, D.C. 10th MLC Fort Lesley J. McNair Washington, D.C. 20319	AC GO RC GO Crim Law Ad & Civ Law GRA Rep	 BG Morrison MAJ Wilkins MAJ McFetridge COL Curtis	CPT Jordan E. Tannenbaum 2686 Centennial Court Alexandria, VA 22311 (703) 578-3419
28-29 Mar 92	Boston, MA 94th ARCOM Days Inn Burlington, MA 01803	AC GO RC GO Ad & Civ Law Crim Law GRA Rep	 BG Ritchie MAJ Comodeca MAJ Tate Dr. Foley	COL Gerald D'Avolio SJA, HQ, 94th ARCOM ATTN: AFKA-ACC-JA Bldg. 1607 Hanscom AFB, MA 01731 (617) 523-4860
4-5 Apr 92	Nashville, TN 125th ARCOM Holiday Inn Crowne Plaza 623 Union Street Nashville, TN 37219	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	 BG Compere MAJ Hostetter MAJ Melvin LTC Doll	LTC Robert Washko U.S. Court House 110 9th Ave. S., No. A-961 Nashville, TN 37203 (615) 736-5151
11-12 Apr 92	Chicago, IL 7th MLC Bldg. 31 Ft. Sheridan, IL 60037	AC GO RC GO Contract Law Ad & Civ Law GRA Rep	 BG Compere MAJ Killam MAJ Lassus COL Curtis	1LT Carolyn Burns 96th JAG Det. Bldg. 82 Ft. Sheridan, IL 60037 (312) 538-0733
2-3 May 92	Columbus, OH 9th MLC Lenox Inn Reynoldsburg, OH 43068	AC GO RC GO Int'l Law Crim Law GRA Rep	 BG Morrison MAJ Warner MAJ Wilkins LTC Doll	MAJ William A. Reddington 765 Taylor Station Rd. Blacklick, OH 43004 (614) 755-5434
9-10 May 92	Jackson, MS 11th MLC Mississippi College of Law Jackson, MS 39201	AC GO RC GO Int'l Law Contract Law GRA Rep	 BG Morrison MAJ Hudson MAJ Dorsey LTC Hamilton	MAJ Dolan D. Self 307 Clarkdell Road Canton, MS 39046 (601) 965-4480 — bpn (601) 856-5953 — h
15-17 May 92	Albuquerque, NM 210th JAG Det Sheraton at Old Town Albuquerque, NM 87104	AC GO RC GO Contract Law Contract Law GRA Rep	 BG Compere MAJ Cameron MAJ Helm COL Curtis	MAJ Darrell Riekenberg 210th JAG Det 400 Wyoming Blvd. NE Albuquerque, NM 87123 (505) 766-1311
19-21 May 92	San Juan, PR 169th JAG Det	AC GO RC GO Int'l Law Ad & Civ Law GRA Rep	BG Ritchie/ BG Morrison MAJ Hudson MAJ McCallum MAJ Griffin	MAJ Winston Vidal Suite 1000, Fomento Bldg 268 Ponce de Leon Hato Rey, PR 00918 (809) 753-8224

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7115, extension 307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1992

6-10 January: 109th Senior Officers Legal Orientation (5F-F1).

13-17 January: 1992 Government Contract Law Symposium (5F-F11).

21 January-27 March: 127th Basic Course (5-27-C20).

3-7 February: 28th Criminal Trial Advocacy Course (5F-F32).

10-14 February: 110th Senior Officers Legal Orientation (5F-F1).

24 February-6 March: 126th Contract Attorneys Course (5F-F10).

9-13 March: 30th Legal Assistance Course (5F-F23).

16-20 March: 50th Law of War Workshop (5F-F42).

23-27 March: 16th Administrative Law for Military Installations Course (5F-F24).

30 March-3 April: 6th Government Materiel Acquisition Course (5F-F17).

6-10 April: 111th Senior Officers Legal Orientation (5F-F1).

13-17 April: 12th Operational Law Seminar (5F-F47).

13-17 April: 3d Law for Legal NCO's Course (512-71D/E/20/30).

21-24 April: Reserve Component Judge Advocate Workshop (5F-F56).

27 April-8 May: 127th Contract Attorneys Course (5F-F10).

18-22 May: 34th Fiscal Law Course (5F-F12).

18-22 May: 41st Federal Labor Relations Course (5F-F22).

18 May-5 June: 35th Military Judge Course (5F-F33).

1-5 June: 112th Senior Officers Legal Orientation (5F-F1).

8-10 June: 8th SJA Spouses' Course (5F-F60).

8-12 June: 22d Staff Judge Advocate Course (5F-F52).

15-26 June: JATT Team Training (5F-F57).

15-26 June: JAOAC (Phase II) (5F-F55).

6-10 July: 3d Legal Administrator's Course (7A-550A1).

8-10 July: 23d Methods of Instruction Course (5F-F70).

13-17 July: U.S. Army Claims Service Training Seminar.

13-17 July: 4th STARC JA Mobilization and Training Workshop.

15-17 July: Professional Recruiting Training Seminar.

20 July-25 September: 128th Basic Course (5-27-C20).

20-31 July: 128th Contract Attorneys Course (5F-F10).

3 August-14 May 93: 41st Graduate Course (5-27-C22).

3-7 August: 51st Law of War Workshop (5F-F42).

10-14 August: 16th Criminal Law New Developments Course (5F-F35).

17-21 August: 3d Senior Legal NCO Management Course (512-71D/E/40/50).

24-28 August: 113th Senior Officers Legal Orientation (5F-F1).

31 August-4 September: 13th Operational Law Seminar (5F-F47).

14-18 September: 9th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

March 1992

2-6: GWU, Cost Reimbursement Contracting, Washington, D.C.

11-13: GWU, Federal Procurement of Architect and Engineer Services, Washington, D.C.

13: LSU, Employment & Labor Law, Baton Rouge, LA.

18-19: ESI, Terminations, Washington, D.C.

20: ESI, Protests, Washington, D.C.

23-25: SLF, Short Course on Employment Discrimination, Westin, TX.

23-27: GWU, Construction Contracting, Washington, D.C.

24-27: ESI, ADP/Telecommunications Contracting, Washington, D.C.

24-27: ESI, Contract Pricing, San Diego, CA.

26-27: LSU, 39th Mineral Law Institute, Baton Rouge, LA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1991 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Requirement
Alabama	31 January annually
Arizona	15 July annually
Arkansas	30 June annually
California	36 hours over 3 years
Colorado	Anytime within three-year period
Delaware	31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	June 30 annually
Louisiana	31 January annually
Michigan	31 March annually
Minnesota	30 August every third year
Mississippi	31 December annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Mexico	30 days after program
North Carolina	28 February of succeeding year
North Dakota	31 July annually
Ohio	Every two years by 31 January
Oklahoma	15 February annually
Oregon	Date of birth—new admittees and reinstated members report an initial one-year period, thereafter, once every three years
South Carolina	15 January annually
Tennessee	1 March annually
Texas	Last day of birthmonth annually
Utah	31 December of 2d year of admission
Vermont	15 July every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June every other year
Wisconsin	20 January every other year
Wyoming	30 January annually

For addresses and detailed information, see the July 1991 issue of *The Army Lawyer.*

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven

cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A229148 Government Contract Law Deskbook Vol 1/ADK-CAC-1-90-1 (194 pgs).

AD A229149 Government Contract Law Deskbook, Vol 2/ADK-CAC-1-90-2 (213 pgs).

AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

*AD A241652 Office Administration Guide/JA 271-91 (222 pgs).

AD B135492 Legal Assistance Consumer Law Guide/ JAGS-ADA-89-3 (609 pgs).

AD B141421 Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).

AD B147096 Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).

AD *A241255 Model Tax Assistance Guide/JA-275-91 (66 pgs).

AD B147389 Legal Assistance Guide: Notarial/ JA-268-90 (134 pgs).

AD B147390 Legal Assistance Guide: Real Property/ JA-261-90 (294 pgs).

AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).

AD A229781 Legal Assistance Guide: Family Law/ ACIL-ST-263-90 (711 pgs).

AD A230991 Legal Assistance Guide: Wills/ JA-262-90 (488 pgs).

AD A230618 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-91 (73 pgs).

AD B156056 Legal Assistance: Living Wills Guide/ JA-273-91 (171 pgs).

Administrative and Civil Law

AD B139524 Government Information Practices/ JAGS-ADA-89-6 (416 pgs).

AD B139522 Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A236663 Reports of Survey and Line of Duty Determinations/JA 231-91 (91 pgs).

AD A237433 AR 15-6 Investigations: Programmed Instruction/JA-281-91R (50 pgs).

Labor Law

AD B145705 Law of Federal Employment/ACIL-ST-210-90 (458 pgs).

AD A236851 The Law of Federal Labor-Management Relations/JA-211-91 (487 pgs).

Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212 Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).

AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).

AD B137070 Criminal Law, Unauthorized Absences/ JAGS-ADC-89-3 (87 pgs).

AD B140529 Criminal Law, Nonjudicial Punishment/ JAGS-ADC-89-4 (43 pgs).

AD A236860 Senior Officers Legal Orientation/JA 320-91 (254 pgs).

AD B140543L Trial Counsel & Defense Counsel Handbook/JA 310-91 (448 pgs).

AD A233621 United States Attorney Prosecutors/ JA-338-91 (331 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam. 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pams, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Their address is:

Commander
U.S. Army Publications Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.

(*2*) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraph] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the Baltimore USAPDC at (301) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 725-50	Requisition and Issue of Supplies and Equipment, Interim Change 101	24 May 91
Cir 350-91-1	Army Individual Training Evaluation Program (ITEP) for (FY) 1992	11 Jul 91

3. OTJAG Bulletin Board System.

a. Numerous TJAGSA publications are available on the OTJAG Bulletin Board System (OTJAG BBS). Users can sign on the OTJAG BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the OTJAG BBS after they receive membership confirmation, which takes approximately forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the OTJAG BBS. Following are instructions for downloading publications and a list of TJAGSA publications that currently are available on the OTJAG BBS. The TJAGSA Literature and Publications Office welcomes suggestions that would make accessing, downloading, printing, and distributing OTJAG BBS publications easier and more efficient. Please send suggestions to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

b. *Instructions for Downloading Files From the OTJAG Bulletin Board System.*

(1) Log-on to the OTJAG BBS using ENABLE and the communications parameters listed in subparagraph a above.

(2) If you never have downloaded files before, you will need the file decompression program that the OTJAG BBS uses to facilitate rapid transfer of files over the phone lines. This program is known as the PKZIP utility. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

(c) Once you have joined the Automation Conference, enter [d] to Download a file.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. From this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(g) The menu then will ask for a file name. Enter [c:\pkz110.exe].

(h) The OTJAG BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off of the OTJAG BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C> prompt. The PKZIP utility then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKZIP utility program.

(3) To download a file, after logging on to the OTJAG BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c below.

(c) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the OTJAG BBS responds with the time and size data, type F10. From the top-line menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(e) When asked to enter a filename, enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. When you hear a beep, file transfer is complete, and the file you downloaded will have been saved on your hard drive.

(g) After file transfer is complete, log-off of the OTJAG BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not a compressed, you can use it on ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering

the ENABLE program. From the DOS operating system C> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the OTJAG BBS). The PKZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "xxxxx.DOC" by following the instructions in paragraph 4(a) above.

c. *TJAGSA Publications available through the OTJAG BBS.* Below is a list of publications available through the OTJAG BBS. The file names and descriptions appearing in bold print denote new or updated publications. All active Army JAG offices, and all Reserve and National Guard organizations having computer telecommunications capabilities, should download desired publications from the OTJAG BBS using the instructions in paragraphs a and b above. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having a bona fide military need for these publications, may request computer diskettes containing the publications listed below from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5¼-inch or 3½-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

Filename	Title
121CAC.ZIP	The April 1990 Contract Law Deskbook from the 121st Contract Attorneys Course
1990YIR.ZIP	1990 Contract Law Year in Review in ASCII format. It was originally provided at the 1991 Government Contract Law Symposium at TJAGSA
505-1.ZIP	TJAGSA Contract Law Deskbook, Vol. 1, May 1991
505-2.ZIP	TJAGSA Contract Law Deskbook, Vol. 2, May 1991
506.ZIP	TJAGSA Fiscal Law Deskbook, May 1991
ALAW.ZIP	Army Lawyer and Military Law Review Database in ENABLE 2.15. Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF
CCLR.ZIP	Contract Claims, Litigation, & Remedies
FISCALBK.ZIP	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA
FISCALBK.ZIP	May 1990 Fiscal Law Course Deskbook in ASCII format
JA200A.ZIP	Defensive Federal Litigation 1
JA200B.ZIP	Defensive Federal Litigation 2
JA210A.ZIP	Law of Federal Employment 1
JA210B.ZIP	Law of Federal Employment 2
JA231.ZIP	Reports of Survey & Line of Duty Determinations Programmed Instruction.
JA235.ZIP	Government Information Practices
JA240PT1.ZIP	Claims—Programmed Text 1
JA240PT2.ZIP	Claims—Programmed Text 2
JA241.ZIP	Federal Tort Claims Act
JA260.ZIP	Soldiers' & Sailors' Civil Relief Act
JA261.ZIP	Legal Assistance Real Property Guide
JA262.ZIP	Legal Assistance Wills Guide
JA263A.ZIP	Legal Assistance Family Law 1
JA265A.ZIP	Legal Assistance Consumer Law Guide 1
JA265B.ZIP	Legal Assistance Consumer Law Guide 2
JA265C.ZIP	Legal Assistance Consumer Law Guide 3
JA266.ZIP	Legal Assistance Attorney's Federal Income Tax Supplement
JA267.ZIP	Army Legal Assistance Information Directory
JA268.ZIP	Legal Assistance Notorial Guide
JA269.ZIP	Federal Tax Information Series
JA271.ZIP	Legal Assistance Office Administration
JA272.ZIP	Legal Assistance Deployment Guide
JA281.ZIP	AR 15-6 Investigations
JA285A.ZIP	Senior Officer's Legal Orientation 1
JA285B.ZIP	Senior Officer's Legal Orientation 2
JA290.ZIP	SJA Office Manager's Handbook
JA296A.ZIP	Administrative & Civil Law Handbook 1
JA296B.ZIP	Administrative & Civil Law Handbook 2
JA296C.ZIP	Administrative & Civil Law Handbook 3
JA296D.ZIP	Administrative & Civil Law Deskbook 4
JA296F.ARC	Administrative & Civil Law Deskbook 6

JA301.ZIP	Unauthorized Absence—Programed Instruction, TJAGSA Criminal Law Division
JA310.ZIP	Trial Counsel and Defense Counsel Handbook, TJAGSA Criminal Law Division
JA320.ZIP	Senior Officers' Legal Orientation Criminal Law Text
JA330.ZIP	Nonjudicial Punishment—Programmed Instruction, TJAGSA Criminal Law Division
JA337.ZIP	Crimes and Defenses Deskbook (DOWNLOAD ON HARD DRIVE ONLY.)
YIR89.ZIP	Contract Law Year in Review—1989

4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crankc(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via autovon should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System.

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are autovon 274-7115 ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

b. The following material has been declared excess by the Staff Judge Advocate, USA Soldier Support Center, ATTN: ATZI-JA, Fort Ben Harrison, IN 46216. Telephone 317-549-5268, MSG Blyther.

Federal Supplement—Vols. 1-492 (last updated 1981)

Northeast Reporter—Vols. 1-401 (last updated 1981)

Please contact the agency directly with your requests for any of these materials.

Subject Index

The Army Lawyer
January 1991—December 1991

Author Index

The Army Lawyer
January 1991—December 1991

Index of Legal Assistance Items

The Army Lawyer
January 1991—December 1991

Index of Policy Memoranda From The Judge Advocate General

The Army Lawyer
January 1991—December 1991

Index of The Judge Advocate General's Opinions

The Army Lawyer
January 1991—December 1991

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